FILE COPY

IN THE

Supreme Court of the United States

Term, 194—

No. 26 MISC.

WILLIAM E. FIFE,
Petitioner

-vs-

The Great Atlantic & Pacific Tea Company, a corporation, Chauffeurs, Stablemen, Helpers and Garagemen, Local Union 249, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, an unincorporated association, B. C. Mazon, President, M. Rosenthal, Vice-President, Jerry Gradeck, Recording Secretary, Scott F. Marshall, Secretary-Treasurer, C. Scanlon, Trustee, William Arensburg, Trustee, Charles Michal, Trustee, Individually and as Officers and Members, Representing Themselves and All Others Having the Same Interest, J. Kenny and M. J. Hannon, and Hazel Kenny, Executrix of the Estate of J. Kenny, Deceased

PETITION FOR WRITS OF CERTIORARI, BRIEF IN SUPPORT THEREOF AND APPENDIX

EDWARD O. SPOTTS, JR.,
JOHN D. MEYER,
Attorneys for Petitioner.

632 Frick Bldg.,
Pittsburgh, Penna.

Murrelle Printing Company, Law Printers, 201-203 Lockhart St., Sayre, Pa.
George K. Jelley, Pittsburgh Representative, 1000 Jones Law Building, Pittsburgh, Pa. Telephone—Court 0973

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PETITION FOR WRITS OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

William E. Fife, by his attorneys, Edward O. Spotts, Jr. and John D. Meyer, prays that writs of certiorari issue to review the judgments and decision of the Supreme Court of the Commonwealth of Pennsylvania in the above entitled case, affirming judgments of the Court of Common Pleas of Allegheny County, Pennsylvania, the opinion of the Supreme Court of Pennsylvania being entered on March 24, 1947 to which a petition for re-argument was refused on April 14, 1947.

STATEMENT OF THE MATTERS INVOLVED

This case reveals a union at its worst in the form of violence, intimidation and disregard for the law, thereby depriving a crippled trucker from the benefits of a good contract, driving him and 54 other truckers out of the trucking business. The violence of the union, its officers, members, agents and goons, although completely revealed in the evidence in this case, was completely nullified by the application of Sec. 8 of the Pennsylvania Act of 1937 by the Pennsylvania Supreme Court which in effect whitewashes unions and makes it impossible to pursue them in Pennsylvania Courts by stating that unions, their officers, members and agents, unlike every other person in Pennsylvania, are not subject to proof which includes presumptions of law and fact.

This case is a common law action of conspiracy by William E. Fife, an independent trucking contractor under a written contract, claiming that the concerted actions of the defendants had put him out of a lucrative trucking business and kept him out of the same. The case was filed and tried in the Common Pleas Court of Allegheny County, Pennsylvania. The defendants in these appeals were Local 249 of the International Brotherhood of Teamsters, etc., B. C. Mazon, President and individually; M. Rosenthal, Vice President and individually and Scott F. Marshall, Secretary-Treasurer and individually; the Great Atlantic & Pacific Tea Company, a Corporation; M. J. Hannon and J. Kenny, trucking contractors. Local 249 is an unincorporated association and it was sued together with its officers

and members in the manner prescribed by the rules of the Supreme Court of Pennsylvania. J. Kenny died since the institution of suit and his executrix, Hazel Kenny, was substituted as a party defendant. Throughout this case, Fife and the independent truckers have been known as the independents; the Atlantic & Pacific Tea Company as the A & P and Local Union 249 as either the Union or 249 and will be so referred to in this petition and supporting brief.

The issues in this case are substantial and important in that 54 other cases are pending against the same defendants, wherein individual contract truckers were put out of business.

About March 1st, 1935, Fife and many other truckers began work as independent contractors under oral contracts for the Atlantic & Pacific Tea Company out of the Pittsburgh Division which involved hauling in Western Pennsylvania, parts of Ohio, West Virginia and Maryland. Their services were so efficient and satisfactory that they were assured by the A. & P. of lifetime trucking if such services were continued. On July 12, 1937, Fife and the other independent truckers entered into written contracts with the Atlantic & Pacific Tea Company for a period of one (1) year to continue hauling in the same territories. (Exhibit No. 1, see Appendix).

On October 10, 1937, Local 249, through its duly authorized officers, members and agents began stopping Fife and the independents and their trucks at various places throughout Western Pennsylvania. This grew into a reign of terror which resulted in many independent truckers being beaten, their trucks, including Fife's, stoned and damaged and one burned and on the morning of October 13, 1937,

Fife and the other independents at a meeting in the A. & P. Headquarters in Pittsburgh were stopped by Vice President King of the A. & P. from hauling any merchandise (T. 1079).

During this reign of terror, various independents, including the appellant, were taken to the union headquarters and when they offered the required fee to join the union, were refused membership. Fife was refused personally by Bernard Mazon, President of Local No. 249, who told him that the Union was not ready for him and when they were, Fife and the independents would no longer be in the trucking business (T. 1877-78).

On October 14, 1937, Vice President King of the A. & P. told a committee representing Fife and the independents that the A. & P. had spent a half million dollars on the previous trouble with Local 249 in 1934-5 and that they were unwilling to spend that kind of money again. He stated that the A. & P. was willing to pay $200.00 a man for each independent and helper, to get into the Union and that he had an appointment with Union officials and their attorney, John R. Frankel, and that if he knew Frankel, money would talk (T. 370). Fife produced evidence which showed that King did have a meeting with Union officials and their attorney at the Union Headquarters that day and that out of such meeting an agreement was reached whereby Fife and the independents were ousted from their contracts and the work turned over to Hannon and Kenny using 249 employees (T. 1811-14-49). The notice of this agreement was given by the A. & P. to Fife and the independents on October 15, 1937 (T. 1881-82) and the agreement was ratified by the Union at a meeting of Local 249 on the following Monday, October 18, 1937 (T. 1814).

Fife and the other independents, though willing and able to haul for the A. & P., never received any hauling after October 13, 1937 due to the concerted action of all these defendants.

Fife, who is a cripple from infantile paralysis, was obliged to sell his truck and go to work on his father's farm where he has eked out an existence for his wife and two children since the ouster. Local 249, whose organization had organized the great majority of profitable hauling contractors in Western Pennsylvania established a permanent blacklist for membership to Fife and the other independents thereby preventing them from working as truckers. When one of the independents attempted to work at a Pittsburgh firm through membership in another local, Bohr the business agent, threatened to get the wrecking crew out (T. 57) and Mazon, the president, threatened to pull the other drivers out (T. 58) thereby causing this independent to lose his employment. Others, who attempted to join Local 249 were booed off the union platform (T. 1217) and as late as September, 1945, one of the independents who wanted to get an emergency membership into Local 249 was required by their officers and attorneys to sign a release abandoning his conspiracy case against Local 249 (T. 1094, Union Exhibit C. C., Record pp. 1417-1419).

The mobs of Union men, throughout the City of Pittsburgh and Allegheny County during the riotous week of October 10th, were lead by and under the immediate supervision of Vice President Rosenthal, Secretary Marshall, President Mazon and Business Agent Earl Bohr of Local 249. On the night of October 12 and the early morning of October 13th, Vice President Rosenthal was in charge of large mobs of 249 members at the 43rd Street warehouse who assaulted, intimidated and threatened Fife and other

independents and badly damaged and stoned trucks and automobiles of Fife and the independents and burned one of them. Rosenthal told one of the independents that they had had the A. & P. job long enough and now 249 wanted it for their boys (T. 547). On Saturday morning, October 15th, Vice President Rosenthal and Business Agent Bohr led a mob of two to three hundred No. 249 men and broke into a meeting of the independents, held in a garage (T. 382) and with upraised tire irons (T. 110) precipitated a serious riot in which Rosenthal and Bohr were rendered unconscious and taken to the hospital (T. 170-172). The hospital and medical expenses of Bohr and Rosenthal were paid out of the treasury of Local 249 (T. 3094-95) and the checks were offered into evidence (T. 1829-30-31; Exhibits 73). Secretary Marshall was stopping trucks on a nearby street directing members of 249 into the affray (T. 902) and on one occasion struck one of his own men who was reluctant about going into the garage (T. 51). President Mazon was seen immediately across the alley from the garage in question at or about the time of the riot (T. 865).

Advance information as to the plans of 249, its officers and members may be found in the record where a named member of 249, about a month or six weeks before October 12, 1937 told one of the independents that his new truck would not look so nice in a short time when Local 249 took over the A. & P. hauling as it was the chief subject of conversation at the Union meetings (T. 336).

Despite the fact that the by-laws of Local 249 required receipted bills should be attached to the cancelled vouchers in the records of the Union, three checks totaling $5,002.70 (T. 1744-5-7—3103-4) were spent during this period, in

which Fife and the independents were driven out of business, for which no receipts, or vouchers were available to show for what this money had been spent, and Secretary Marshall admitted most of the money went for pickets (T. 3105). In addition, the record definitely shows that the attorney for the Union, John R. Frankel, received a check for $2,500.00 for his one conference with Vice President King of the A. & P. which resulted in the ousting of Fife and the other independent contract truckers. In addition, the minutes of the Union were replete with eulogies of Frankel shortly after the ousting of Fife, together with a gift of $1,000.00 for the wonderful work he had done (T. 3352-3-4).

Fife's case against the other defendants, the A. & P., Hannon and Kenny, is predicated on the fact that they joined a conspiracy already instituted by the Union, its officers and members in that the dismissal of Fife and the taking over of his contract made them conspirators in accordance with leading Federal and State decisions throughout this country, detailed hereafter in the supporting brief.

On Wednesday morning, October 13th, before Fife and the independents had been denied hauling by Vice President King, of the A. & P., Hannon, one of the defendants was told by King to purchase new trucks (T. 1249) and Hannon did purchase new trucks which were in operation before 1:00 p. m. of that same day, the trucks being operated by men furnished from 249 headquarters (T. 1250). Kenny, the other trucking contractor defendant, had also been contacted by the A. & P. before King had stopped Fife and the independents from hauling (T. 2811) and was in operation on October 13th using equipment other than he regularly used (T. 1268-69-70-71-72) and continued thereafter, using

members of 249 to operate this equipment. All of the hauling formerly done by Fife and the independents in October of 1937 has since, up to the time of the present trial, been done by Hannon, Kenny or by the A. & P. with its own equipment, all three using members of 249 as their employees.

This case was on trial in Pittsburgh, Pennsylvania, before Honorable Joseph A. Richardson and a jury from January 21st, 1946 to March 23rd, 1946 and the record consists of 3643 typewritten pages. The jury, after a deliberation of 99½ hours, a record civilly in Allegheny County, disagreed. Seven (7) jurors filed affidavits, accusing the tipstaff, a former street car union president, of urging the foreman of the jury to, "stick it out—stick it out—don't give up, I'll let you know when", and advising another juror that it was easy to terminate the case, "Just send word down that you disagree." Evidence presented before an investigating committee of three judges of the Court of Common Pleas showed that the jury stood 10 to 2 for a verdict against all the defendants, two of the jurors holding out for the union. As a result of the tipstaff's intervention, this case is known in Pennsylvania as that of the 13th juror.

Each of the defendants, except Kenny for whom a directed verdict had been entered, filed motions for judgment upon the record which were argued before a court en banc in the Common Pleas Court and the court en banc duly entered judgments upon the record in favor of all of the defendants, the trial judge, Richardson, J., dissenting from the entry of judgments in favor of B. C. Mazon, M. Rosenthal and Scott F. Marshall both as officers of Local 249 and as individuals, but filed no dissenting opinion. The

majority opinion of the Court below held that Section 8 of the Labor Anti-Injunction Act of 1937, P. L. 1198, 43 PS Section 206 H, which does not allow presumptions of law or fact to be used against Unions, their officers or members, would not apply in the instant case as no labor dispute existed at the A. & P.

The lower court, in its opinion at page 36, (52 A. 2d) stated the following:

> "In this connection we may add that the plaintiff's evidence would warrant a finding that there was no labor dispute at the A. & P., and the provisions of Section 8 of the 'Labor Anti-Injunction Act' of 1937, P. L. 1198, 43 PS 206h would not be applicable in that event."

Fife, thereupon, took appeals to the Supreme Court of Pennsylvania from the judgments entered upon the record and the directed verdict entered in favor of Kenny, and the Supreme Court of Pennsylvania affirmed the lower court, using Section 8 of the Labor Anti-Injunction Act as a basis for their affirmance, stating at page 39, (52 A. 2d) the following:

> "In dealing with the evidence said to support the charges against the union and the three officers it is necessary to consider section 8 of the Act of June 2, 1937, P. L. 1198, 1202, 43 PS 206h."

The Supreme Court of Pennsylvania then, at the same page, reprinted as a footnote Section 8 of the Pennsylvania Labor Anti-Injunction Act, said section being contained in this petition under the heading of "Constitution and Statute Involved".

Fife, thereupon, filed a petition for reargument setting up the unconstitutionality of Section 8 of the aforesaid Act, which petition was refused by the Supreme Court of Pennsylvania. The petition for reargument and the order thereon are found hereafter in the appendix.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania may be found at 356 Pa. 265, 1937; 52 Atl. 2nd, 38. The Opinion of the Court of Common Pleas may be found at 52 Atl. 2nd, 24 (See Appendix).

JURISDICTION

The statutory provision believed to sustain the jurisdiction of this court is Section 237 of the Judicial Code, as amended (U.S.C.A. Title 28, 2nd Sec. 344), which provides as follows:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

QUESTIONS PRESENTED

1. Whether the Supreme Court of Pennsylvania erred in holding there was no issue of fact for the jury's consideration when the ordinary rules of evidence made it mandatory for the submission of the case to the jury with reference to the participation of a union, its officers, members and agents in a conspiracy to put the petitioner out of business.

2. Was your petitioner denied the equal protection of the law when a section of a statute of the Commonwealth of Pennsylvania was applied holding in effect that unions, their officers and members were immune from presumptions of law and fact in a conspiracy case?

3. Was your petitioner deprived of his property without due process of law when the Supreme Court of Pennsylvania ruled that there was no issue of fact for a jury's consideration and applied as a basis for such decision a section of a statute of the Commonwealth of Pennsylvania which in effect stated that unions, their officers, members and agents were not subject to presumptions of law and fact.

4. Is a section of a statute of the Commonwealth of Pennsylvania unconstitutional which provides in effect that no officer, member or union shall be held responsible in a civil suit for the unlawful acts of individual officers, members or agents only by the weight of the evidence without the aid of any presumptions of law or fact both in the doing

of such acts or the actual participation in or of ratification of such acts after actual knowledge thereof.

5. Where a party has submitted a case showing that a union, its officers and members had instituted a conspiracy to destroy his written contract and business and that the joining in of the other party to the contract by breaching the same and giving the rights under the contract to the two other conspirators, is not the complaining party denied the equal protection of the laws in having a section of a statute applied against him which immunizes unions, their officers, members and agents from presumptions of law and fact in said conspiracy, said union, its officers, members and agents having instituted said conspiracy which was joined in by the others, who are automatically absolved with the immunization of the union, its officers and members.

6. Was your petitioner deprived of due process of law when the Supreme Court of Pennsylvania, for the first time in the case, applied the unconstitutional section of this act to the case and thereafter refused petitioner's request for a re-argument in order to present the unconstitutionality of this Act?

7. Whether the Supreme Court of Pennsylvania erred in examining the facts of this case, a common law action of conspiracy, other than according to the rules of common law.

REASONS FOR GRANTING THE WRITS

1. Petitioner has been deprived of his property without due process of law in the application of an unconstitutional section of a Pennsylvania Act to his case by the Supreme Court of Pennsylvania, when the same had not been applied in the court below nor argued in the Supreme Court of Pennsylvania and that Court refused petitioner's request for a reargument in regard to the constitutionality of the same.

2. Your petitioner has been denied equal protection of the laws when an act of the legislature was applied by the Supreme Court of Pennsylvania holding that a labor union, its officers and members were not subject to presumptions of law and fact, thereby depriving petitioner of vital evidence in a conspiracy case.

3. Your petitioner's constitutional guarantee of trial by jury has been violated in that his common law case of conspiracy was re-examined by rules other than common law.

4. The decision of the Supreme Court of Pennsylvania in applying Section 8 of the Act of June 2, 1937, P.L. 1198-1202 is in conflict with the decisions of this Court as expressed in Hill vs. State of Texas, 62 S. Ct. 1159, 316 U.S. 400, 1942; Smith vs. State of Texas, 61 S. Ct. 164, 311 U.S. 128, 1941; Fielden vs. People of State of Illinois, 12 Supreme Ct. 528, 1892.

5. Your petitioner has been deprived of his property without due process of law and has been denied equal protection of the laws, when co-conspirators who joined in after the inception of the conspiracy, were automatically released, when the fountainhead of the conspiracy was exonerated by the application of an unconstitutional section of an act to the proof in regard to the original conspirators.

CONSTITUTION AND STATUTE INVOLVED

The 14th Amendment to the Constitution of the United States provides as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The 5th Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in time of War or public danger; nor shall any person be subject for the same offenses to be twice put into jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The 7th Amendment to the Constitution of the United States which in its pertinent parts provides:

> "In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury

shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

Section 11 of Article 1 of the Constitution of Pennsylvania lays down the fundamentals for interpretation of the succeeding Articles of the Constitution. It provides as follows:

> "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct."

Section 7 of Article 3 of the Constitution of Pennsylvania provides as follows:

> "The General Assembly shall not pass any local or special law: • • •
>
> "Regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate."

Section 8 of the Act of June 2, 1937, P.L. 1198, 1202, 43 PS 206 H, a part of the Pennsylvania Anti-Labor Injunction Act provides as follows:

"No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as herein defined, shall be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members or agents, except upon proof beyond a reasonable doubt in criminal cases, and by the weight of evidence in other cases, and without the aid of any presumptions of law or fact, both of—(a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof by such association or organization."

PRAYER

Wherefore, your petitioner respectfully prays that writs of certiorari be issued out of this Court, directed to the Supreme Court of Pennsylvania, commanding that Court to certify and to send to this Court on a day certain to be therein named a full and complete transcript of the record and all proceedings had in this case in which the judgments are entered in the Supreme Court of Pennsylvania under the following designations: Local Union 249 et al., No. 144 March Term, 1946; the Great Atlantic and Pacific Tea Company, No. 145 March Term, 1946; M. J. Hannon, No. 146 March Term, 1946; Hazel Kerny, Executrix of the Estate of J. Kenny, deceased, No. 147 March Term, 1946; B. C. Mazon, President, Local 249 and indi-

vidually, No. 148 March Term, 1946; Scott F. Marshall, Secretary-Treasurer, Local 249 and individually, No. 149 March Term, 1946, M. Rosenthal, Vice-President of Local 249 and individually, No. 150 March Term, 1946, to the end that this case may be reviewed and determined by this Court and that the judgments of the Supreme Court of Pennsylvania be reversed and for such further relief as this court may deem proper.

And your petitioner will ever pray.

EDWARD O. SPOTTS, JR.,
JOHN D. MEYER,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania may be found at 356 Pa. 265, 1947; 52 Atl. 2nd, 38. The opinion of the Court of Common Pleas may be found at 52 Atl. 2nd, 24.

STATEMENT OF THE CASE

The statement of the case appears in the petition and in the interest of brevity is not reprinted herein, except that in the argument, some of the facts in the case are given more detail.

STATUTES INVOLVED

Sub-section 1 of Section 3 of the above Act provides as follows:

"1"—the term "organization shall mean every unincorporated or incorporated association of employers or employees."

Section 8 of the above act provides as follows:

"No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as herein defined, shall be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members or agents, except upon proof beyond reasonable doubt in criminal cases, and by the weight of evidence in other cases, *and without the aid of any presumptions of law or fact*, both of—(a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof by such association or organization." (Emphasis ours)

JURISDICTION

The jurisdiction of this Court is invoked under Section 237 b of the Judicial Cole, as amended (U.S.C.A. Title 28, Sec. 344 as set forth in the petition.)

This case has been protracted due to filibusters by way of Rules for Bills of Particulars and Petitions for Continuances, not filed by your petitioner, which may be found in the original record. Your petitioner finally was able to get the case up for trial in March of 1943 and after a trial lasting two (2) weeks and embracing 1170 typewritten pages of testimony, a nonsuit was granted by Judge Kennedy upon the basis of Section 8 of the Act of 1937. Your petitioner then asked to have the non-suit removed and strenuously argued before a court en banc consisting of Judges Kennedy, Richardson and McNaugher the unconstitutionality of Section 8 of the Act of 1937. Written briefs were filed supporting our contention of unconstitutionality which can be produced, if necessary. The court en banc removed the non-suit without ruling on the question of constitutionality. The case was then delayed by another filibuster and finally went to trial on January 21, 1945, and continued for a period of nine and one-half (9½ weeks), embracing 3643 typewritten pages of testimony, during which time no evidence was excluded by reason of Section 8 of the Act of 1937. The jury disagreed and a court en banc consisting of Judges Richardson, Kennedy and Adams entered judgments upon the record for the defendants involved in these appeals, Judge Richardson dissenting as to Mazon, Mar-

shall and Rosenthal, both as officers and individuals. The court en banc, by Judge Richardson, flatly held that Section 8 of the Act of 1937 had no application to the instant case, when it stated at page 36, 52 A. 2nd the following:

> "In this connection we may add that the plaintiff's evidence would warrant a finding that there was no labor dispute at the A. & P., and the provisions of Section 8 of the 'Labor Anti-Injunction Act' of 1937, P.L. 1198, 43 PS 206 h would not be applicable in that event."

It is the duty of a court en banc in Pennsylvania, on a motion for judgment on the record to consider all the evidence in the light most favorable to the plaintiff, *as stated by the lower court in its opinion in this case.* Your petitioner took appeals to the Supreme Court of Pennsylvania from the entry of judgments upon the record and the Supreme Court of Pennsylvania, in affirming the judgments of the lower court, used as a basis for such affirmance Section 8 of the Act of 1937. It stated at page 39, 52A.2nd in its opinion the following:

> "In dealing with the evidence said to support the charges against the union and the three officers it is necessary to consider section 8 of the Act of June 2, 1937, P.L. 1198, 1202, 43 PS 206 h."

A footnote, at the bottom of page 39, 52A.2nd, in the opinion, reprints Section 8 as aforestated.

The above ruling came as a complete surprise to the petitioner as the opinion of the Court of Common Pleas definitely states that the Act of 1937 had no application to the instant case. The admissibility or the exclusion of any

of the evidence in the entire record, under the basis of Section 8 of the Act of 1937 was not argued before the Supreme Court of Pennsylvania. Your petitioner then filed a petition for re-argument for the sole purpose of attacking the constitutionality of this section of the Act and requested the Supreme Court of Pennsylvania, in the event the re-argument was not granted, to deliver an opinion as to the constitutionality of this section of the Act. The petition for re-argument was refused without an opinion by the Supreme Court of Pennsylvania. The petition for re-argument and the refusal may be found in the appendix of this brief.

We believe that under the *Doctrine of Brinkerhoff-Faris Trust & Savings Company vs. Hill,* 50 Supreme Court 451, 281 U.S. 673, 1930; *Saunders vs. Shaw,* 244 U. S. 317, 320, 37 Supreme Court 638; *Ohio ex rel. Bryant vs. Akron Metropolitan Park District for Summit County,* 281 U.S. 74, 79, 50 S. Ct. 228, *Great Northern Ry. Co. vs. Sunburst Oil & Refining Co.,* 287 U.S. 358, 366, 367, 53 S. Ct. 145, the raising of the matter is now timely. In this connection, we particularly call the court's attention to the opinion of Justice Brandeis in the Brinkerhoff-Faris case, *supra,* which, at page 453, states the following:

> "The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that in applying the new construction of article 4 of Chapter 119 to the case at bar, and in refusing relief because of the newly formed powers of the commission, the court transgressed the due process clause of the Fourteenth Amendment. The additional federal claim thus made

was timely, since it was raised at the first opportunity. Missouri ex rel Missouri Insurance Company vs. Gehner, 281 U.S. 313, 50 S. Ct. 326, 72 L. Ed.

The petition was denied without opinion. This Court granted certiorari 280 U. S. 550, 50 S. Ct. 152, 74 L. Ed. : We are of the opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff 'due process of law'—using that term in its primary sense of an opportunity to be heard and to defend its substantive right."

SPECIFICATIONS OF ERROR TO BE URGED

1. In affirming and entering judgments for respondents.

2. In holding that Section 8 of the Act of June 2, 1937, P. L. 1198-1202 of the state of Pennsylvania applied to the instant case.

3. In applying said section at the very end of the case when the case had been tried on a different theory in the court below.

4. In refusing petitioner's request for a reargument, without an opinion, as to the constitutionality of said section.

5. In re-examining the facts of this case, a common law action in conspiracy, by a method or methods other than according to the rules of common law.

6. In holding that petitioner had not submitted issues of fact sufficient for a jury's consideration and determination.

ARGUMENT

I. SECTION 8 OF THE ACT OF JUNE 2, 1937, P.L. 1198, 1202, 43 PS 206 H OF THE COMMONWEALTH OF PENNSYLVANIA IS UNCONSTITUTIONAL

Section 8 of the Act of 1937 was injected into this case by the Supreme Court of Pennsylvania when the lower court had entered judgments upon the record against your petitioner and had held that under the facts of the instant case, the statute had no application. The lower court, in its opinion at page 36 of the Atlantic Reporter stated:

> "In this connection we may add that the plaintiff's evidence would warrant a finding that there was no labor dispute at the A. & P., and the provisions of Section 8 of the 'Labor Anti-Injunction Act' of 1937, P.L. 1198, 43 PS 206 h would not be applicable in that event."

Your petitioner took appeals to the Supreme Court of Pennsylvania from the entry of judgments upon the record by the lower court and the Supreme Court of Pennsylvania in affirming the judgments of the lower court used as a basis for such affirmance Section 8 of the Act of 1937. The Supreme Court of Pennsylvania, in its opinion at page 39 of the Atlantic Reporter applied Section 8 to this case and then in a footnote at the bottom of the page reprinted Section 8 verbatim. It stated at page 39 of the Atlantic Reporter the following:

"In dealing with the evidence said to support the charges against the union and the three officers it is necessary to consider section 8 of the Act of June 2, 1937, P.L. 1198, 1202, 43 PS 206 h."

That a legislature has a right to make or alter rules of evidence is not denied by your petitioner but it is vehemently asserted that in so doing due regard must be had that each citizen receives equal protection of the laws, that such legislation must be impartial and uniform and that such a statute should not attempt to exercise a judicial power.

In the case of *Dielden vs. People of the State of Illinois,* 12 Supreme Ct. 528, 1892, the late Justice John Harlan stated:

"We take, as is our duty, the law of Illinois to be, as declared by its highest court, that amendments of the record of a court, in derogation of its final judgment, are not permitted in that state after the expiration of the term at which the judgment was rendered. *That law is applicable to all persons within the jurisdiction of the state; and its enforcement against the plaintiff in error, cannot, therefore, be said to be a denial to him by the state of the equal protection of the laws. Neither discussion nor citation of authorities is required to support a proposition so manifestly correct".* (Emphasis ours)

Wigmore on Evidence, Volume 1, Section 7, page 213, states:

"(c) *The legislative function is separate from the judicial function; and a statute which attempts in effect*

to exercise a judicial power is invalid. The judicial power involves the application of the law to concrete facts and, therefore, the investigation and establishment of the facts. Any statute which prevents the judicial body from ascertaining the facts in litigation coming properly before it is ineffective. It is on this ground that a statute which prescribes a conclusive effect for certain testimony may be held invalid, though not a statute merely changing the existing rule as to burden of proof (Post Ss 1353, 1354). Here, indeed, a genuine rule of evidence is involved (as distinguished from a rule of substantive law under the guise of evidence, as in par. (b) supra); but the invalidity would be due, not to any intrinsic lack of legislative control over the rules of evidence in general, but to the effect of that particular kind of a rule in depriving the judiciary of the exercise of its constitutional function." (Emphasis ours)

These principles are also recognized by the Supreme Court of Pennsylvania in the case of *Rich Hill Coal Co. vs. Bashore,* 334 Pa. 449, 1939, 7 Atl. 2nd 302, but for some reason were not applied in the instant case. In the *Rich Hill case* Chief Justice Maxey at page 485 of the Pennsylvania Reports states:

"We recognize the right of the legislature to create or alter rules of evidence. But this power is subject to these limitations: (1) It is at least doubtful if the legislature can, under the guise of creating a 'rule of evidence', make something evidence which is in fact not evidence. (2) If in fact the legislature is attempting to regulate a rule of evidence, '*its regula-*

tion must be impartial and uniform:' Cooley on Constitutional Limitations, 8th ed., Vol. 2, p. 168." (Emphasis ours)

A cursory glance at Section 8 of the Act in this case indicates that its contents and effects are not uniform and impartial. The very term "association of employers" in Sub-section 1 of Section 3 of this act would eliminate individual corporations such as a railroad company, a bus company, a steel company, a theater, a church, a hospital, a Y.M.C.A. or any other corporations when acting in their individual capacities and not as a member of, or acting in concert with, an association of other employers. To a like effect, each individual employer, and each individual citizen of this Commonwealth involved in a labor dispute is deprived of the common law rules of evidence and proofs to which they had been lawfully entitled and which has been expressly removed from legislative interference by the fourteenth and fifth amendments of the Constitution of the United States and Section 7 of Article 3 of the Pennsylvania Constitution.

For instance suppose some non-union employees were standing near the gate of a struck mill and a truck of the struck union, with the insignia and name of the union marked on the truck deliberately ran them down. Under Pennsylvania law, testimony on behalf of the injured as to the name on the truck, *Nalevanko v. Marie,* 328 Pa. 586, 590, 1937, 195 Atl. 49, would be sufficient to shift the burden on the defendant and make the ownership and agency question, a jury question. But not if Section 8 of the Act of 1937 was applied. The injured would be completely deprived of a presumption of law and fact which would be available

to them against every person in the state except a labor union, its officers and members engaged or interested in a labor dispute. But, suppose, the truck of the union had been struck by a truck of the non-union man who was at the gates of the plant in reference to his job, and his name was on the truck, the union or their officers or members could then sue the non-union man and take advantage of the presumption in *Nalevanko v. Marie* and many other Pennsylvania cases, the very presumption that is denied to the non-union man. That such a situation is based on class legislation which is neither impartial nor uniform and is not equal protection of the laws is so manifest that it speaks for itself.

The section herein complained about was almost bodily lifted from the Norris-LaGuardia Act, Act of March 23, 1932, Ch. 90, Sec. 6, Stat. 71, except that the Pennsylvania Act adds the damning, special, unconstitutional provisions "without the aid of any presumption of law or fact". This clause is conspicuously absent from the Norris-LaGuardia Act, Section 6, providing as follows:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members or agents, except upon clear proof, of actual participation in, or actual authorization of, such acts, or of ratification of such acts, after actual knowledge thereof, Mar. 23, 1932, c. 90, Sec. 647 Stat. 71."

The evidence was so overwhelming in this case against the union, its officers and members, using the ordinary rules of evidence applicable to all citizens of the state of

Pennsylvania, that we respectfully submit that the judgments on record, entered by the court below, could only be sustained by the application of this unconstitutional section to the evidence and if such a section is held to be constitutional, then it removes unions, their officers and members from prosecution, civilly and criminally for unlawful acts during a so-called labor dispute.

Your petitioner was most certainly not involved in a labor dispute. He was an independent trucker, owning his own equipment, paying his helper and paying himself for gas, oil and the other things for his truck such as tires, garage and insurance. There was absolutely no complaint as to wages, working conditions or representation as your petitioner and the other independent truckers stood on their own feet. Fife and the independents are in at least as strong a position as the truckers in the very recent case of *Greyvan vs. Silk* of this court decided at No. 673 October Term, 1946, where Mr. Justice Reed stated:

> "Probably it is quite impossible to extract from the statute a rule of thumb to define the limits of the employer-employee relationship. The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete. These unloaders and truckers and their assistants are from one standpoint an integral part of the businesses of retailing coal or transporting freight. Their energy, care and judgment may conserve their equipment or increase their earnings but Greyvan and Silk are the

directors of their businesses. On the other hand, the truckmen hire their own assistants, own their trucks, pay their own expenses, with minor exceptions, and depend upon their own initiative, judgment and energy for a large part of their success."

"There are cases, too, where driver-owners of trucks or wagons have been held employees in accident suits at tort or under workmen's compensation laws. But we agree with the decisions below in Silk and Greyvan that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

The appeals of Fife required the Supreme Court of Pennsylvania to examine the whole record in the light most favorable to the plaintiff. The record was to be examined upon the theory by which the case had been tried in the court below. This is settled law in Pennsylvania and one of the many cases so stating is the case of *Weiskircher vs. Connelly*, 256 Pa. 387, 1917; 100 Atl. 965, 1917, where Mr. Justice Stewart said at page 390:

"Discussion of the question raised by this assignment would be out of place for the reason that when

a case is brought here on appeal it is to be considered on the theory it was tried on in the court below, and that alone." (Emphasis ours)

Was that done in the instant case? Most certainly not. In the first place the court below held that no labor dispute existed, and therefore, the Act of 1937 did not apply. The Supreme Court of Pennsylvania, in applying Section 8 of the Act of 1937, automatically held that a labor dispute existed. And this issue was not before them. The whole issue before them was whether or not the plaintiff had submitted a case sufficient to have been passed upon by a jury. The opinion of the Supreme Court of Pennsylvania can be studied from every angle and we respectfully submit that the only fair analysis that can be reached for the affirmance of the lower court after such a study is that Section 8 of the Act of 1937, was the moving factor therein and particularly the printing of the entire section in the footnote of the opinion speaks for itself in that respect.

This very point, that the decision was based upon Section 8 of the Act of 1937, was raised in our Petition for Re-Argument as follows:

> "This court, in applying the above section of the Act quoted, based its decision upon a section of an act which is in violation of the Constitution of the Commonwealth of Pennsylvania and the United States of America."

The Supreme Court of Pennsylvania did not grant a re-argument nor did it call in its opinion without a reargument and correct it as it did in *Haller vs. Pennsylvania Railroad Co.*, 306 Pa. 98, 1931, 159 Atl. 10, where a mistake

had been called to its attention in the petition for reargument and a new opinion was written, correcting the old theory still sustaining the original decision. We submit that the Supreme Court of Pennsylvania in not granting a reargument or correcting its opinion without a reargument, affirmed our position that the basis of sustaining the lower court was Section 8 of the Act of 1937.

The Supreme Court of Pennsylvania denied to your petitioner due process of law in refusing to hear him with reference to the constitutionality of this act and our basis for this statement are the words of Justice Brandeis in the case of *Brinkerhoff-Faris Trust & Savings Company*, 50 Supreme Ct. 451, 281 U.S. 673; 1930 at page 453 as follows:

> "We are of the opinion that the judgment of the Supreme Court of Missouri must be reversed, *because it has denied to the plaintiff 'due process of law' * * * using that term in its primary sense of an opportunity to be heard and to defend its substantive right.*" (Emphasis ours)

The term, equal protection of the laws, to an American, we submit is synonymous with the term fair play. This, the petitioner did not receive in this case. He was matched against a union with a membership of six to eight thousand (T. 3380) against probably the largest retail chain in the United States and two of the largest Pittsburgh trucking contractors. Despite the fact that these defendants were allowed, over protest, sixteen jury challenges to petitioner's four and that practically every juror either belonged or had relatives or close friends who were union members,

still this jury was 10 to 2 against all defendants, with a court investigation being ordered as to the conduct of the foreman, the leader of the minority, and the tipstaff in charge of the jury during the record long deliberations.

With such a terrific burden why should this plaintiff be shackled and fettered in attempting to get his day in Court by giving these defendants the benefit and protection of a law that was not available to Fife or any other citizen in Pennsylvania. This section was special legislation at its worst, it was not uniform and impartial and it prevented a judicial body from properly ascertaining the facts in litigation coming before it. We have been unable to find an identical situation previously before this Court but we do believe that the opinions in the following cases, set down the principles which should be applicable to the instant case.

In the case of *Hill vs. State of Texas*, 62 Supreme Court 1159, 316 U.S. 400, 1942, Chief Justice Stone said at page 1162 the following:

> *"Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all the least deserving as well as the most virtuous."* (Emphasis ours)

And in the case of *Smith v. State of Texas*, 61 Supreme 164; 311 U.S. 128, 1941, Mr. Justice Black at page 165 said:

> "The fact that the written words of a state's laws hold out a promise that no such discrimination will be

practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised."

The difficulty of establishing a case against a union, its officers and members with the ordinary methods of proof is recognized in the case of *Allis-Chalmers vs. Reliable Lodge*, 111 Fed. 264 (1901) where no statute was in effect, depriving the plaintiff of presumptions of law and fact. In that case Judge Kohlsaat at page 267 stated:

> "That a conspiracy existed among a number of these officers and members to stop, and thereby injure, the business of complainant, by intimidation and violence is evident. *In a conspiracy of this character, where it is difficult to even learn the names of individual members of the lodges, the active cooperation of the individual members in the conspiracy is difficult to establish by direct proofs; but their acquiescence in, and connivance at, the methods pursued by their officers and leaders, is easily established by the results sought and accomplished.*"
>
> (Emphasis Ours)

In a similar vein are the words of Judge Wilkerson in the leading case of *United States vs. Railway Employees Department*, A. F. L. 283 Fed. 479, where a preliminary injunction was granted against the defendants to restrain them from a conspiracy to interfere with the mails, the court so aptly said:

> "*Notwithstanding the warnings against acts of violence set out in the instructions of June* 27, 1922, *there*

began, throughout the country, a series of depredations which rapidly developed, in some portions, into a reign of terror. Railroad bridges were dynamited; spikes were removed from the rails; obstructions were placed upon railway tracks; bombs were exploded on tracks and in railroad yards and hurled at moving trains. Notwithstanding the admonitions of the leaders of the combination to use peaceful means only, the real situation at most of the places where the strike was in progress was that employees were insulted, assaulted and otherwise intimidated. *The word of the 'peaceful' picket, spoken in the vicinity of the shops, was emphasized in the darkness of night by the club and pistol of the 'unknown party'.* Regardless of the instructions that no injury must be inflicted upon property, there was sabotage on a large scale. Engines, cars, and equipment were tampered with, and innumerable acts of malicious mischief were committed, which endangered the lives of both passengers and those operating trains.

The unlawful acts are shown to have been on such a large scale, and in point of time so connected with the admitted conduct of the strike, that it is impossible on the record here to view them in any other light than done in furtherance of a common purpose and as part of a common plan. The record does not permit the conclusion that those who did not actually know that those things were being done, and that they were the direct result of the methods by which the strike was being conducted. And if they did not actually know they were charged with such knowledge."

(Emphasis Ours)

To show the effect of the application of this act in the instant case, we have in the next section of this argument set up a partial list of presumptions of law and fact that this petitioner was deprived of by the application of this act.

II. SOME OF THE PRESUMPTIONS OF LAW AND FACT THAT PLAINTIFF WAS DEPRIVED OF BY THE APPLICATION OF SECTION 8 OF THE ACT OF 1937

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1. That mobs of men, throughout the tri-state area, wearing 249 buttons, engaged in assaulting and intimidating appellant and his associates (T. 382, 466, 269, 642), were acting for Local Union 249.

2. That the many acts of violence, intimidations and law breaking performed by men wearing 249 buttons under the leadership of officers and business agents were on such a large scale and in point of time so connected that it is impossible to view them in any other light than done in the furtherance of a common purpose and as part of a common plan.

3. Such widespread evidence of concerted mob action does not permit the conclusion that the Union, its officers and members did not actually know these things were being done as a direct result of the Union's plan against the plaintiff and his associates and if they did not actually know, they were actually charged with such knowledge.

4. That officers and business agents of said Union leading said mobs of 249 men (T. 382, 547, 270, 1154), were acting for Local Union 249.

5. That carte blanche authority had been given to the members of the mobs as Mazon testified at pages 43 and 44:

> "It all depends on how the boys feel whether you come back or not."

and Marshall at page 3072, who testified as follows:

> "Q. These men did not go pell-mell all over the city without some instructions from you officers.
>
> "A. When these fellows went out they were more or less on their own. They went wherever they felt like. There was no direct supervision to tell them 'You go here' or 'You go there'."

Some of the authorities for the above statements are as follows:

Commonwealth v. Merrick, 65 Pa. Supr. 482 at 490;

Commonwealth v. Frankfeld, 114 Pa. Supr. 262, 1934; 173 Atl. 834;

Commonwealth v. Kohn, 116 Supr. 28, 1935; 176 Atl. 242;

United States v. Railway Emp. Dept., 283 Fed. 479;

Calcutt v. Gerig, 271 Fed. 220, 1921.

6. That President Mazon was acting for the union as an officer and himself individually when in the union headquarters during this riotous week he told the plaintiff, who

was applying for a membership in Local 249, the following: (T. 1876-1877)

> "Q. What did he (Mazon) say?
>
> A. He said, 'We are not ready for you fellows yet and when we are you won't be in the trucking business'."

7. That President Mazon was acting for the union as an officer and himself individually when he met with R. R. King, Vice President of the A & P and arranged the terms of the ouster of the plaintiff and their succession by Hannon and Kenny.

The following is from the testimony of Scott F. Marshall, Secretary Treasurer of Local 249:

(T. 1849):

> "Q. Mr. Marshall, in your conversations with Mr. Mazon, the president of the Union, and Mr. Frankel, attorney for the Union, isn't it a fact that you learned from them that the A & P had made a proposal to the union for the settlement of this strike?
>
> A. Yes.
>
> Q. What were the terms of that proposal, as you learned them?
>
> A. That all the Union men go back to work at their former jobs at a certain rate of pay, but I don't remember the proposed rate of pay just now."

(T. 1811):

> "Q. What was the purpose of that meeting?
>
> A. To get all the former A & P truckers into the meeting and find out who was not working.

Q. Have you the minutes of that meeting with you?

A. I don't know whether there were any minutes kept of that meeting.

Q. There were several hundred people there. There certainly would be minutes kept?

A. Not necessarily. It was not necessarily a constituted meeting. It was more or less a call meeting to find out who was still unemployed of the A & P truckers who went on a strike in December, 1934."

(T. 1814):

"Q. Do you remember this meeting?

A. Yes.

Q. Where was it?

A. Peoples Alliance Building.

Q. You have quite a large auditorium there?

A. Right.

Q. At this particular meeting, who presided?

A. I think it was President Mazon presided.

Q. Was he on the platform?

A. I think so.

Q. Were you on the platform?

A. I think so.

Q. What was put up to the men that night?

A. The proposal of going back to the work for the A & P Tea Company and settling all possible grievances.

Q. Under some kind of terms that you don't remember the nature of?

A. Right.

Q. And some of you men were also going to work for Hannon and Kenny?

A. Some of them were already working for Hannon and Kenny.

Q. This matter that was being discussed and acted upon at this meeting, covered not only the drivers that were going to work for the A & P but also the other drivers?

A. It covered everybody working at the A & P both directly and indirectly."

8. That Vice President Rosenthal was acting for the Union as an officer and himself individually when leading the large mob of 249 men at the 43rd Street Riots, told an independent trucker when requested for Union membership the following (T. 547):

"No, you boys have had this job long enough. Now, we want it for our boys."

9. That Business Agent Bohr was acting for the Union as an officer, member or agent in Union headquarters when in refusing independent truckers membership the following took place:

(T. 378):

"Q. What took place between you and Bohr?

A. He was given my application with the money. He looked at the application. I handed him my application with $27.00, initiation fee and dues. He read the application, tore it up, threw it into a waste basket and said he didn't want any part of us, and passed me back the money."

The authorities for the above statements are found in the cases of *Farneth vs. Commercial Credit Co.*, 313 Pa. 433,

169 Atl. 89, 1933, and *Keidel vs. Baltimore & Ohio Railroad Co.*, 281 Pa. 289, 126 Atl. 770, 1924.

10. That Vice President Rosenthal and business agent Bohr were acting for the union when they led a mob of two hundred to three hundred 249 men into a garage where the independent truckers were holding a meeting and with upraised tire irons in their hands caused a serious riot. (T. 110, 168, 382)

11. That Local 249 did ratify the acts of Vice President Rosenthal and Business Agent Bohr in said riot when they paid their hospital and medical expenses totaling approximately $700.00. (T. 3094, 3095, 1751, 1829, 1830, Dr. Sable's check, Plaintiff's Exhibit No. 72; T. 1831).

The authority for the above, we submit is *United Mine Workers vs. Coronada Coal Co.*, 259 U.S. 344, 1922, where Chief Justice Taft at page 402 said:

> "The President of District No. 21 and the union miners, including Slankard, whose agency in and leadership of this attack were fully proven, were present in the courtroom at the trial, but did not take the stand to deny the facts established. Indeed they had been previously brought to trial for conspiracy to defeat the federal administration of justice and for contempt because of these very acts, had pleaded guilty to the charges made, and had been sentenced to imprisonment, and their expenses as defendants in and out of jail had been paid by the District out of the District treasury and the disbursements approved by the District in convention.

Argument

It is contended on behalf of District No. 21 and the local unions that only those members of these bodies whom the evidence shows to have participated in the torts can be held civilly liable for the damages. There was evidence to connect all these individual defendants with the acts which were done, and, in view of our finding that District No. 21 and the unions are suable, we can not yield to the argument that it would be necessary to show the guilt of every member of District No. 21 and each union in order to hold the union and its strike funds to answer."

12. The spoliation, destruction and suppression of papers and records, particularly the three checks of 249 totaling $5,002.70 issued during the riotous period of plaintiff's ouster were instrumental in his ouster when the union was unable to produce one single receipt or voucher (T. 3074) as required by the by-laws to show what the money had been spent for.

13. The spoliation, destruction and suppression of the letters of the local union and their attorney to the International Union reporting on this riotous period gives rise to the presumption that such reports would have been unfavorable to them.

McHugh vs. McHugh, 186 Pa. 197, 201, 40 Atl. 410 (1898);

Diehl v. Emig, 65 Pa. 320.

14. That the union check, dated November 12, 1937, plaintiff's exhibit No. 32, in the amount of $2500.00 to John R. Frankel, Local 249 attorney, marked "final payment A & P strike trouble" was for the sole purpose of

rewarding Frankel for his one and only meeting with R. R. King, Vice President of the A & P, wherein the agreement was engineered and made whereby Fife and the independent truckers were ousted.

15. That the extensive eulogies of Attorney Frankel in the minutes of the union, shortly after the ouster of Fife, telling of his wonderful work and the great expense he had saved the union (T. 3352-53) plus a gift in the sum of $1,000.00 by the union (T. 3354) were directly concerned with Frankel's work in the ousting of Fife and the independents.

16. That the union had deliberately planned this action against Fife and the independents as stated by a member of the union, John Holleran, to independent Joseph Griffin about a month before the ouster. This conversation (T. 336) was as follows:

"Q. What was your conversation with John Holleran about a month before October 13, 1937?

A. Why, I parked in front of my home and just pulled up and parked the truck and this fellow came along driving a produce truck for another company and stopped in his truck, too, and admired the truck. He said, 'It is a beautiful looking truck, Joe, but a month from now it won't look so beautiful.' And I asked him the reason why and he said, 'Down at our meetings it was the main topic that the Union organization would have a drive on and take over the A & P hauling.'

Q. You have known John Holleran since you were a boy?

A. Yes, sir.
Q. And your address at this time was what?
A. 7211 Idlewild Street."

17. The failure to produce a union member, John Holleran, to deny the above testimony, raises the presumption that if he had been produced, his evidence would have been unfavorable to the defendant.

Hoffman vs. Berwind-White Mining Co., 265 Pa. 476, 1920 109 Atl. 234 (1920);

Steel et al., Appellants v. Snyder, 295 Pa. 120, 1929 144 Atl. 912 (1929).

18. That there was a definite connection between the ousting of Fife and the independents and the continuous course of conduct of Local 249 in refusing to take them into membership, the gestapo treatment consisting of booing them off the platform (T. 1217) and in one instance, compelling an independent to sign a paper abandoning his suit against 249 in exchange for an emergency membership. (T. 1094).

Zuback vs. Bakmaz, 346 Pa. 279 at 282, 1943 29 A.2nd, 473.

19. The many erasures (T. 3084-3077), delineations, substitutions, interlining in the books and records of the Union on material matters and unexplained, raises the presumption that the union was attempting to conceal or manufacture evidence. (T. 3077-3084-3352-53-3075-76-3081)

Hoffman vs. Berwind-White Mining Co., 265 Pa. 476 at 484 and 485 109 Atl. 234 (1920).

20. The many fabrications, evasions, incongruities (T. 3410-3401-3363-3106-3262-3490-3212-3137-4145-3225-3181-3077-78) and misstatements of the union, its officers and witnesses give rise to the presumption that the truth would have operated against the union defendants.

McHugh vs. McHugh, 186 Pa. 197, 201, 40 Atl. 410 (1898).

III. THE APPLICATION OF THE SECTION 8 OF THE ACT OF 1937 NULLIFIED A CONSPIRACY INSTITUTED BY THE UNION, ITS OFFICERS, MEMBERS AND AGENTS WHICH HAD BEEN JOINED IN BY THE A. & P., HANNON AND KENNY, AND AUTOMATICALLY RELEASED THE LATTER

Your petitioner's case against the A. & P., Hannon and Kenny was based upon the premise that the union, its officers, members and agents had instituted a conspiracy to put your petitioner and the other independents out of business and that the conspiracy was doomed to failure if the A. & P. stood by its contract and it was further doomed to failure if Hannon and Kenny had not helped furnish the equipment and cooperation necessary to a successful breach.

Therefore, the application of Section 8 of the Pennsylvania Act of 1937 exonerated the union, the fountain head of the conspiracy and automatically released the A. & P., Hannon and Kenny.

The A. & P. definitely became a party to this conspiracy when Vice President King met with President Mazon of the union and the union attorney, John R. Frankel and

consummated an agreement whereby Fife was ousted and replaced with Hannon and Kenny using 249 men as their employees. (T. 1811-1814-1819)

The appellant, since the inception of this case has challenged the A. & P. to produce one case that will overrule the rule of law laid down in the following cases, viz "The breach of the contract made the A. & P. a party to the conspiracy." These cases are from both Federal and State courts and we have been unable to find any case to the contrary.

In the leading case of *Aberthaw v. Cameron,* 194 Mass. 209, 80 N. E. 478 (1907), the Christian Science Board of Directors, one of the defendants, had granted a contract for the construction of a large building. The plaintiff, was the contractor in charge of the erection of said building and he was requested by a union to discharge one of his employees and was threatened with a general strike in case he did not. The plaintiff refused to discharge said employee whereupon the church through the members of its Board of Directors requested plaintiff either to discharge the employee, procure employment for him elsewhere or permit them to procure employment for him. This the plaintiff refused to do whereupon the church ordered plaintiff to cease work as they had decided to finish the building in a different manner. They ordered plaintiff from the job and when he refused to leave called one of their watchmen to compel him to leave. The church, a party defendant along with the union and its officers, was held a party to the conspiracy, the court saying:

> "In the general scheme of the conspiracy the breaking of the contract which subsequently followed

was an important element, and when taken in connection with the action of the other bodies of which the board had knowledge, the concluding finding that the defendants against whom this bill is prosecuted 'conspired together to compel the plaintiff to employ only union carpenters' and 'that in pursuance of such conspiracy they caused a breach of the existing contract of employment between the plaintiff and the defendant board, without any just cause or lawful provocation' was well warranted. Walker v. Cronin 107 Mass. 555; South Wales Miners' Federation v. Glamorgan Coal Co., (1905) A. C. 239, 253."

In the case of *Central Metal Products Company v. O'Brien*, 278 *Federal* 827 (1922), affirmed in *O'Brien v. Fackenthal*, 5 Federal (2nd) 389 (1925), the complainant had a contract with the City of Cleveland for furnishing and installing metal doors, casings, etc., in a hospital under construction and in doing the work of installation employed Union carpenters. Defendants, who were officers of a Sheet Metal Workers Union, claiming that they were entitled to the work, called strikes of their men on other City work, whereupon their co-defendants, the City Engineer and Director of Public Welfare of the City of Cleveland, respectively without authority from the city refused to permit complainant to proceed with its contract, using the police to prevent its men from working.

The appellate court in O'Brien v. Fackenthal stated at page 390, the following:

"The majority of the Court think that the judgment should be affirmed, and, in the main for the reasons stated by the district judge in both opinions. Judge

Mack thinks otherwise. Under these circumstances it seems sufficient to state the conclusions of the majority without elaboration."

Part of the opinion of Judge Westenhaver, the District Judge above referred to, under the caption of *Central Metal Products Company v. O'Brien,* 278 Federal 827 (1922) at page 829 is as follows:

> "No other conclusion therefrom can be drawn than that the defendants have entered into a conspiracy to deprive plaintiff of its property and to injure its business. It is immaterial if the city or its architect and director of public welfare were induced to become members of the conspiracy under coercion or to avoid pecuniary loss or other trouble. See Aberthaw v. Cameron, 194 Mass. 209, 80 N. E., 478, 120 Am. St. Rep. 542; Lehigh v. Str. Steel Co. v. Atl. Smelting & Ref. Co., 111 Atl. 376; Buyer v. Gullian, (2 C. C. A.) 271 F. 65."

In the case of *J. C. McFarland Co. v. O'Brien, et al.,* 6 Fed. (2nd) 1016 (1925), officers of a union insisted that plaintiff use other unions to furnish doors when plaintiff had planned to use the same union carpenters who had installed the doors. Plaintiff was a subcontractor to the Fuller Company who insisted that he give in to the union. When the plaintiff refused to accede to the union, his contract was terminated by the Fuller Company, who employed another to finish the job. The Court refused the preliminary injunction stating that the defendant had an adequate remedy at law and referred and approved the case of *Central Metal Products Company v. O'Brien,* 278 Fed. 827, when he stated at page 1017 *"The law as*

therein stated is approved and need not be reiterated.'' The Court then went on further to re-emphasize the law as applicable to these particular kind of cases when it stated at page 1017, the following:

> "Briefly, plaintiff's contract with the George A. Fuller Company is plaintiff's property. In law it is entitled to protection on the same basis and under the same rules as is one's dwelling house. In law, the officers of said three local unions and the George A. Fuller Company have no more right to conspire or agree to deprive plaintiff of its property in that contract than they would have to conspire and agree to deprive plaintiff of its office building. It is immaterial that the George A. Fuller Company joined said conspiracy unwillingly and with a view to protect itself from loss on its contract or with other subcontractors. In law, said local unions, their officers and members, have no right to coerce the George A. Fuller Company to join their conspiracy under threat of withdrawing their members from working for other sub-contractors on said building or other buildings on which the George A. Fuller Company and other sub-contractors were engaged. In law, complainant has the full right to employ any competent workmen, whether members of the defendant's local unions or other unions or no unions, to perform the work of painting or finishing down its elevator and swing doors and metal trim. In law, said local unions and their members had the right to procure this work from the plaintiff by the same methods as other workers not members of their union would have a right to procure it. It is true that they have the right to combine and act through agents selected by

themselves to apply for said work and bargain collectively as to the terms upon which it is to be done, but the combined right is, in law, no greater than the right of a single worker."

In the case of *Lehigh Structural Steel Company vs. Atlantic Smelting & Refining Works,* 92 N. J. E. 131, 111 A 376, , the Lehigh Structural Steel Company contracted to fabricate and deliver to Atlantic Smelting & Refining Works the structural steel for a building at Brills, Newark and to erect it. They sublet the erection to Donnell-Zane who had almost finished the erection when their employees struck. Donnell-Zane were then going to finish with non-union men but Lehman, the architect for the Atlantic Company, said no, because there would be a general strike of the allied trades on the works and later the Atlantic Company cancelled the contract.

In holding the Atlantic Smelting and Refining Works as a conspirator Judge Backes at page 144 said:

"Lehman and the Atlantic Company ask upon what theory they can be deemed co-conspirators, inasmuch as the proofs show that strike was called by the Unions without their knowledge and without consultation or intimation. The answer is, they joined the conspiracy later on, after the strike, when, out of fear of a general strike, they broke their contract to help it along. This was decided in Aberthaw Construction Co. v. Cameron, 194 Mass. 208—a case strikingly similar to the one at hand. There the Christian Science Church contracted with the Aberthaw Company for the construction of an edifice in Boston. The labor unions insisted that the contractor discharge a non-

union man. The contractor refused and the unions threatened a strike, whereupon the church ordered the contractor off the job."

and at page 143 said:

> *"Their excuse is that they feared the wrath of organized labor and were acting in self-defense. In other words, they breached their contract to avert a general strike of the trades unions on the work. That that is not a legal excuse for breaching the contract needs no argument. And that it furnishes a legal excuse for joining the oppressors of the complainants is even less defensible. Their protection lies in the law, not in the graces of those who transgress the law."*

In the case of *Buyer v. Gullian*, 271 Federal, 65 (1921), cited in 41 F. S. 258 (1941), Circuit Judge Ward at page 68 said:

> "It will be seen that the representatives of the union admit the existence of an agreement that their members will not handle the plaintiff's interstate shipments unless he sends them to the Old Dominion Transportation Company by some transfer agency operated entirely by union men, and the Old Dominion Transportation Company admits that it will not transfer his shipments until its employees consent to handle them. For this reason it may be regarded as a party to the combination."

We particularly call this court's attention to the Pennsylvania case of *Eddyside vs. Seibel*, 142 Superior 174, 15 2nd Atl. Reporter 691, 1940, which we consider to be exactly in point with our position with regard to holding the A & P as a co-conspirator.

In that case, a verdict and judgment was affirmed against ten defendants. Six of the defendants were officers or members of a local musical union in Easton, Pennsylvania. Four of the defendants were conductors or business managers of dance orchestras from other localities who had written contracts with the plaintiff for the furnishing of dance music at its Eddyside pavilion.

The local union through its officers and the six defendants wrote letters to the four dance orchestra defendants informing them that the furnishing of music at plaintiff's pavilion had been restricted by the national office to members of the local union. As a result the four dance orchestra defendants did not carry out their contracts.

We submit that the position of the orchestra conductors in the Eddyside case and that of the A & P in the instant case are both analogous. The orchestra conductors breached their contracts by reason of the duress of the local union. The A & P breached its contract in the instant case for similar reasons. That their jurisdiction for so doing is a question for the jury may be found in the opinion of Judge Rhodes at page 183 as follows:

> "In view of such evidence it cannot be said that the trial court should have dismissed the action for want of proof of the intentional character of appellant's conduct, or their consciousness of and unconcernedness with the effect of their action upon plaintiff. Thereafter, the only point remaining for determination was justification, legal or social. *The evidence convicted them of sufficient inconsistency in that respect to make the deliberation of a jury indispensable.*"
>
> (Emphasis Ours)

As to the A. & P., Hannon and Kenny joining the conspiracy after its inception, we call this Court's attention to *Hindman v. Richie,* Brightly N. P. 143, (Penna.) where at 159 it is stated.

> "It makes no difference at what time any one came into the conspiracy. Every one who does enter into such a common purpose or design is, in law a party to every act which had been previously done by any of the others in pursuance of such common design."

Henry on Pennsylvania Trial Evidence, Section 272, at page 392 reads as follows:

> "But although one of the alleged conspirators was not originally a party thereto, if he subsequently joins in the unlawful enterprise and accepts its benefits he becomes a party to every act which had been previously done by any of the others in pursuance thereof and is affected by their declarations."

Potter Press vs. C. W. Potter, 22 N. E. 2nd—1930 (Mass. Supreme) where Judge Lummus said:

> "It seems unnecessary to discuss in detail the attacks made by the defendants upon the general finding that a conspiracy existed. That finding is not inconsistent with any of the subsidiary findings. *One may be held a member of an illegal conspiracy and responsible for its doings, although he was not aware of its entire scope, or all its details, or the identities, of all its members, and although his own share in its activities was small, did not begin until its activities were well under way, and was actuated by motives very different from those of his fellow conspirators.*"

Atty. Gen. vs. Tufts 239 Mass. 458, 459, 494—131 N. E. 573, 132 N. E. 328, 17 ALR 274; Mortmean vs. Foley 231 Mass. 220, 223, 120 N. E. 445, 1-ALR 1145; Lovejoy vs. Bailey 214 Mass. 134, 133, 101 N. E. 63; McDonald vs. U. S. 1 Cu. 19 F. 2nd 175.

With reference to the actions of Hannon and Kenny, the truckers who took the hauling away from your petitioner and the independent truckers, we call this court's attention to the following cases. The first case, *Sorenson vs. Chevrolet Motor Company and Sander,* 171 Minn, 260, 214 N. W. 754 Minn. Supreme, besides applying to Hannon and Kenny, is also a complete answer to the contention of the A. & P., adopted by the Supreme Court of Pennsylvania, that the ten day cancellation clause in petitioner's contract, makes it idle to allow a jury to pass on whether the A. & P. entered the conspiracy. In the Sorenson case, the plaintiff had a contract to sell cars for the Chevrolet Motor Company which also contained a ten day cancellation clause. Sander, who was Sorenson's competitor, got the Chevrolet Company to give him the agency which it did by repudiating the plaintiff's contract without giving him the required notice of cancellation, as the A. & P. did in the instant case. The Court, in holding both the Chevrolet Company and Sander by Wilson C. J. at pages 265 and 266 said:

"Under his contract with the corporation plaintiff had built up a valuable business. His relations with the company were mutually satisfactory. Sander, a stranger to the contract, wished to put an end to the business relations between plaintiff and the company and induced the company to repudiate the contract. If he had done this for no other purpose than to deprive

plaintiff of the benefits of the contract and of his established business, under all the cases Sander would be liable for his wrongful interference in the contract relations between plaintiff and the company. But according to the complaint Sander had another motive. Not only did he wish to deprive plaintiff of his business, but he also desired to appropriate the business to himself. It cannot be said that this desire furnishes an excuse or justification for an act which would otherwise be unlawful. On the contrary, it accentuates the inherent wrongfulnes of Sander's conduct. Under the circumstances, it would be contrary to the decided weight of authority to hold that Sander was serving his legitimate interests or that his conduct was free from wrong, or that, *since plaintiff* has a cause of action against the company *for breach of contract, Sander should go scot-free.* It seems clear that elementary principles of business ethics demonstrate the unlawfulness of Sander's conduct, and the law ought to insist on as high a standard of business morality as prevails among reputable business men."

"The Liability of the corporation under the allegations of the complaint is equally apparent, for it is alleged that it was a *party to the agreement with Sander to deprive plaintiff of his business, and by its acts enabled Sander to appropriate the business.*"

(Emphasis Ours)

In the case of *Eyak River Packing Company vs. Huglen,* 143 Wash. 229, 225 P. 123—1927, Judge Fullerton at page 244 stated the following:

"Briefly, the evidence by which the respondents were sought to be charged was this: There was an active

attempt on the part of certain persons, be their ultimate purpose what it may, to injure and destroy the plaintiff's business. The respondents were operating a rival concern, and to compel the plaintiff to quit operations as a salmon packing plant, and to obtain its fishing grounds, was an advantage to them. They permitted fishermen in their employ to encroach upon the plaintiff's fishing grounds and catch fish which would otherwise have been caught by the plaintiff's nets and weirs. When the plaintiff felt compelled to sell its plant, they furnished the money to make the purchase and paid to the persons whose acts induced the sale and who had obtained an option to purchase, a thousand dollars for their bargain, thereby obtaining title to and possession of the plaintiff's plant and business. *It is true, there is in the record a plausible explanation of these acts. There is evidence to the effect that they but took advantage of a situation caused by others, which situation they had no part in causing, and it may be that the preponderance of the evidence is in their favor. But it seems to us clear that there was here a conflict in the evidence, rather than a want of evidence, making the question one for the determination of the jury, and one on which their determination is obligatory upon the court.*"

(Emphasis Ours)

In the case of *Kroger Grocery & Baking Co. vs. Retail Clerks' International Protective Ass'n., Local No.* 494 *et al.*, 250 Fed. 89 (1918), where the clerks called a strike against a store of the Kroger Company and their pickets advised people not to go into plaintiff's store but to patronize one of the defendants, Cohn, who was fair to labor, it was

shown that Cohn, though not a member of the Union, had taken no steps to disaffirm this conduct but in fact had encouraged it. In holding Cohn as a defendant, the Court at record page 297 stated the following:

> "Of course, this man was not interested in the welfare of the employees, or the success of the strike so far as it affected the employees; but what he was interested in was his own business, hoping, by reason of the closing of the competitor's store, he would do more business."

The above case was cited with approval by District Judge Trieber in the case of *United Mine Workers vs. Coronado Coal Company*, 258 F. 829 (1919), where he stated at page 837 the following:

> "The admission in evidence of the indictment and pleas of guilty of some of the defendants, was clearly proper against those defendants, as admissions made by them, *and if their unlawful acts were applauded and approved by their codefendants, after having encouraged them in their unlawful acts, such approval is a ratification of these unlawful acts, and makes them liable.*"
>
> (Emphasis Ours)

We have deliberately not gone into the evidence involving the A & P, Hannon and Kenny, besides the negotiations surrounding the breach and ouster. Vice President King of the A & P knew about the Union push ten days before hand (T. 2697) and Hannon, a former A & P employee and an associate knew about it for three or four weeks before (T. 1550). Cowie, in charge of the A & P

trucking in relation to the independents, had told one independent (Griffin, T. 288) not to buy new equipment, six weeks before and another independent, Shillo (T. 1786) the same thing on October 12, 1937. Cowie had also told one of the independents on the afternoon of October 12, 1937 that the A & P would not stand back of the independents if there was any trouble.

Hannon had been told by the A & P to buy new equipment before Fife and the independents were stopped from hauling (T. 1249) and Hannon and Kenny were both in operation within several hours after independents were stopped (T. 965-1250-1368), both using new and old equipment (T. 965-1250-1368-9-70-1-2), both using 249 men as their employees. The outstanding result of this conspiracy is that since October 13, 1937 to the date of the last trial, the hauling done by Fife and the independents, has been done by Hannon, Kenny or the A & P with its own equipment, using 249 men as their employees.

The evidence with reference to the A & P, Hannon and Kenny, besides the actual breach and succession to the contract is in line with the principle recognized in the leading case of *Rodin vs. U. S.* 186 Fed. 568 (1911) where Judge Cox at page 570 said:

> *"Conspirators do not go out upon the public highways and proclaim their intention. They accomplish their purpose by dark and sinister methods and must be judged by their acts."*
>
> (Emphasis Ours)

It is further recognized in the recent case of *Scheele vs. Union Loan & Finance Company,* 274 Northwestern

673 (Minn. Supreme 1937), where Justice Stone at page 678 stated:

> *"Conspirators do not make minutes of their machinations, progress and objectives.* Seldom therefore can conspiracy be proved by other than circumstantial evidence. *It is only by assembling the results with such evidence as may be of the progress thereto by the participants, that the victim can ever make a case of conspiracy. If in the end there is a completed structure of result, the frame of which has been furnished piecemeal by several individuals, the parts when brought together showing adaptation to each other and fitness for the end accomplished, it is at least reasonable to confer concert in both planning and fabrication."*
>
> (Emphasis Ours)

No other conclusion can be reached than that the whole defense of the A & P during October of 1937 and throughout the trial of this case has been:

> "Fear of a labor union."

That this is not a defense in law is so well stated by Judge Bakes in Lehigh vs. Atlantic Smelting, *supra*, that it bears repeating:

> *"Their excuse is that they feared the wrath of organized labor and were acting in self-defense. In other words, they breached their contract to avert a general strike of the trades unions on the work. That that is not a legal excuse for breaching the contract needs no argument. And that it furnishes a legal excuse for joining the oppressors of the complainants*

is even less defensible. Their protection lies in the law, not in the graces of those who transgress the law."
(Emphasis Ours)

We therefore respectfully submit that the application of Section 8 of the Act of 1937, eliminated the fountainhead of this conspiracy, the union, its officers and members thereby automatically eliminating the A & P, Hannon and Kenny, who had joined in and made the conspiracy successful, enjoying all benefits thereof and that writs of certiorari should issue in regard to the A & P, Hannon and Kenny.

CONCLUSION

It is respectfully submitted that the principle involved in this case merits the review of the same by writs of certiorari by this Court. Our modern legislative bodies seem to be primarily interested with legislation affecting either labor or capital. The little fellow representing, many more in number, is invariably caught between these two and bears the brunt of their clashes. Certainly, when he obtains his day in Court, he should receive it in the American spirit of fair play, before a jury of his peers and by rules of evidence which are uniform and impartial and afford equal protection to all.

We further respectfully submit that this case clearly presents the little fellow being caught between labor and capital and ground to pieces.

The actions of the Union, its officers, members and agents were so highhanded, outrageous and unlawful in this

case that the Supreme Court of Pennsylvania, in exonerating them by use of Section 8 of the Act of 1937, inferentially placed the following sign above the equal protection, due process and trial by jury amendments of the Constitution of the United States and the State of Pennsylvania:

> "Unions, their members, officers and agents exempted from the provisions hereof."

The A & P, by its callous indifference to the appellant and his associates and the sanctity of their written contracts, in their zealous regard for the almighty dollar, readily ignored the system of independent enterprise upon which the A & P, itself was founded. The necessities of its business did not require such an immediate ouster of the appellant and his associates unless the A & P was enmeshed in the conspiracy.

Hannon and Kenny are in the position of birds of prey, who when the opportunity presented itself, pounced upon the business of the appellant and his associates without regard to their written contracts and without regard to ordinary business ethics.

In stark contrast is the faith of the petitioner and the fifty-four independents in the laws of their State and of this country. For ten long years the petitioner has waited for his day in Court and when it did come, was completely annihilated by an outrageous, unconstitutional class piece of legislation. It is not idle conjecture to state that these men, their helpers and sympathizers could have also taken the law into their own hands and wreaked great damage upon the property and persons of these respondents.

Argument

Your petitioner was caught between two economic giants, labor on one hand and capital on the other, and it is respectfully submitted that if his rights are to be determined and adjudicated by legislation such as Section 8 of the Pennsylvania Act of 1937, we can only say with all the fervor that we can muster:

"God help the little fellow".

Respectfully submitted,

EDWARD O. SPOTTS, JR.
JOHN D. MEYER
Attorneys for Petitioner.

APPENDIX

I.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA

(At Nos. 144-150 March Term, 1946)

The plaintiff has taken seven appeals in his action charging the defendants with having conspired to breach a written contract made by him and the Great Atlantic & Pacific Tea Company, one of the defendants, referred to in this opinion as A. & P. The other defendants were General Teamsters, Chauffeurs, Stablemen, Helpers and Garage Men, Local Union 249, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, an Unincorporated Association, B. C. Mazon, President; M. Rosenthal, Vice President, Jerry Gradeck, Recording Secretary; Scott F. Marshall, Secretary-Treasurer; C. Scanlon[1], Trustee; William Arensberg, Trustee; Charles Michal, Trustee, individually and as officers and members, representing themselves and all others having the same interest: M. J. Hannon, and Hazel Kenny, Executrix of the Estate of J. Kenny, Deceased.

During the course of a long trial[2] a compulsory nonsuit was entered in favor of the executrix of the Estate

[1] No evidence was offered against Scanlon, Arsenberg and Michal, officers of the union; verdicts in their favor were directed; no appeal was taken from the judgments on those verdicts.

[2] The record before us contains more than 3500 pages of typewritten matter.

of Joseph Kenny, deceased. The jury disagreed as to the other defendants who then moved for judgment on the whole record, Act of April 20, 1911, P. L. 70, 12 PS § 684. The motions were granted in an opinion written by Judge Richardson for the court in banc composed of himself, and Judges Kennedy and Adams.

It is unnecessary to detail the various positions taken by appellant in his brief, because the material questions in the case are sufficiently considered in the opinion filed below.

(16, 17) It has long been the settled rule in this Commonwealth that proof of conspiracy must be made by full, clear and satisfactory evidence.[3] The mere fact that two or more persons, each with the right to do a thing, happen to do that thing at the same time is not by itself an actionable conspiracy: Cf. Rosenblum v. Rosenblum, 320 Pa. 103, 181 A. 583.

(18) There is much testimony concerning agents and employees of the A. & P. on the one hand and the plaintiff on the other but nothing that can be regarded as full, clear and satisfactory evidence of a conspiracy to breach its contract with plaintiff. On the contrary, the evidence is clear that the A. & P.'s operating expense would be greatly increased, as in fact it was, by severing hauling relations

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[3] Morris v. Halford, 352 Pa. 138, 42 A.2d 411; Novic v. Fenics, 337 Pa. 529, 11 A.2d 871; Rosenblum v. Rosenblum, 320 Pa. 103, 181 A. 583; Ballantine v. Cummings, 220 Pa. 621, 70 A. 546; Kaiser v. Ins. Co. of North America, 274 Pa. 239, 243, 117 A. 791; Commonwealth v. Benz, 318 Pa. 465, 178 A. 390; Commonwealth v. Bardolph, 326 Pa. 513, 525, 192 A. 916; Pollock v. Lowry, 198 Pa. 117, 47 A. 1117.

with plaintiff and other non-union truckers. The written contract contained a clause reserving to each party the right to cancel on 10 days notice. In the circumstances shown in the record it is idle to suggest that a jury would find or be permitted to find that this defendant would conspire to destroy the contract when ten days' notice would accomplish the result.

(19, 20) With respect to Appeal No. 144, from judgment in favor of union No. 249, and the Appeals No. 148, 149 and 150, from judgment in favor of Mason, Marshall and Rosenthal, officers of the union, the elements of the question for consideration are somewhat different from those presented in the case against the A. & P. In dealing with the evidence said to support the charges against the union and the three officers it is necessary to consider section 8 of the Act of June 2, 1937, P. L. 1198, 1202, 43 PS §206h.[4] With respect to Appeal No. 146 from the refusal to take off the nonsuit entered on the motion of the executrix of Joseph Kenny, plaintiff encountered an additional difficulty; Kenny's death closed plaintiff's mouth. As to these four appeals, we also agree that the evidence does not

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[4] "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as herein defined, shall be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of indivdual officers, members or agents, except upon proof beyond a reasonable doubt n criminal cases, and by the weight of evidence in other cases, and without the aid of any presumptions of law or fact, both of—(a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof by such association or organization."

measure up to what the rule requires. We realize from our consideration of the evidence and from what is said in the elaborate briefs of argument, that in presenting a case like this there was, and probably always will be, difficulty in supplying the measure of proof required by the law, but we may not for that reason relax the settled rule. We therefore adopt the opinion written by Judge Richardson; we may add that while the members of the learned court below were not unanimous with respect to Mason, Marshall and Rosenthal, we all agree that in the case of each appeal the judgment appealed from must be affirmed.

Affirmed.

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

Nos. 144, 145, 146, 147, 148, 149, 150 March Term, 1946.

II.

PETITION FOR REARGUMENT

To the Honorable, the Chief Justice and the Justices of Said Court:

Comes now the appellant, above named, by his attorneys, Edward O. Spotts, Jr., and John D. Meyer, and petitions this Court for a reargument in the above case for the following reasons:

First. This Court, at page 3 of its opinion, states the following:

> "In dealing with the evidence said to support the charges against the union and the three officers it is necessary to consider section 8 of the Act of June 2, 1937, P. L. 1198, 1202, 43 PS 206h.[4]"

Footnote 4, above quoted, found at the bottom of page 3 of this Court's opinion quotes section 8 of the Act of June 2, 1937, P. L. 1198, 1202, 43 PS 206 as follows:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as herein

defined, shall be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members or agents, except upon proof beyond a reasonable doubt in criminal cases, and by the weight of evidence in other cases, *and without the aid of any presumptions of law or fact*, both of—(a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof by such association or organization." (Emphasis ours)

This Court, in applying the above section of the Act quoted, based its decision upon an Act which is in violation of the Constitution of the Commonwealth of Pennsylvania and the United States of America.

The 14th Amendment to the Constitution of the United States provides as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.*" (Emphasis ours)

The 14th Amendment is applicable only to the states, but the Federal Government is likewise bound by the provisions of the Fifth Amendment to the Constitution which is as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put into jeopardy of life or limb; nor shall be compelled in any Criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation." (Emphasis ours)

Section 11 of Article I of the Constitution of Pennsylvania lays down the fundamentals for interpretation of the succeeding Articles of the Constitution. It provides as follows:

"All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct."

In order that every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, Section 7 of Article 3 of the Pennsylvania Constitution provides as follows:

"*The General Assembly shall not pass any local or special law:* * * *

"*Regulating the practice or jurisdiction of, or*

> *changing the rules of evidence in, any judicial proceeding or inquiry before courts,* aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate:" (Emphasis ours)

Although containing almost the identical language of the Norris-LaGuardia Act, the Pennsylvania Labor Anti-Injunction Act goes still further and adds the clause "without the aid of any presumption of law or fact." This clause is conspicuously absent from the Norris-LaGuardia Act which reads as follows:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members or agents, except upon clear proof, of actual participation in, or actual authorization of, such acts, or of ratification of such acts, after actual knowledge thereof, Mar. 23, 1932, c. 90, Sec. 647 Stat. 71."

Sub-section 1 of Section 3 of the Act of 1937 reads as follows:

> "1"—the term " 'organization' shall mean every unincorporated or incorporated association of employers or employees."

Section 8, above referred to, is definitely special legislation affecting only a small part of the Commonwealth and is in direct violation of Section 7 of Article 3 of the Consti-

tution of the State of Pennsylvania and of the 14th and 5th Amendments of the Constitution of the United States in that it would change rules of evidence in reference to this small class of individuals, in comparison with the total population of this State, whereby this appellant is being denied the equal protection of the laws and is being deprived of his property without due process of law.

The very term "association of employers" in Subsection 1 of Section 3 of the Act of 1937 would eliminate individual corporations such as a railroad company, a bus company, a steel company, a church, a hospital, a Y.M.C.A., or any other corporation when acting in their individual capacities and not as a member of, or acting in concert with, an association of other employers. To a like effect, each individual employer, and each individual citizen of this Commonwealth involved in a labor dispute is deprived of the common law rules of evidence and proofs to which they had been lawfully entitled and which has been expressly removed from legislative interference by the Constitution of the State of Pennsylvania and of the United States of America.

The argument, herein requested, is necessary to the just disposition of all the appeals in this case in that under the proof offered by the appellant, the Union, its officers and agents, was the fountain-head of a conspiracy, joined in by the other defendants, which resulted in the economic destruction of the appellant.

We further request such a reargument, or in the event of no reargument, we respectfully request this Court to deliver an opinion as to the constitutionality of the section of the Act of 1937, above referred to, in order that the

record in this case may be perfected for an appeal to the Supreme Court of the United States of America.

We feel that the section of the Act of 1937, above referred to, is so outrageously unconstitutional, being a class legislation affording special methods of proof and evidence to labor unions and their members that it affects every individual in this Commonwealth, and because of the importance of the question, we respectfully submit that a reargument should be granted in order that cases from other states, and the Supreme Court of the United States could be presented to show that the application of such an act in the instant case deprives the appellant of his Constitutional guarantee of equal protection of the laws, and further deprives the appellant of his property without due process of law.

(Signed) EDWARD O. SPOTTS, JR.,
(Signed) JOHN D. MEYER,
Attorneys for Appellant.

III.

ORDER OF THE PENNSYLVANIA SUPREME COURT

April 14, 1947, reargument refused.
Per Curiam.

IV.

OPINION OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

Richardson, J.

This is an action in trespass to recover damages sustained as the result of an alleged conspiracy entered into by the defendants, the object of which was to bring about a breach of a hauling contract which had been entered into by plaintiff with The Great Atlantic & Pacific Tea Company. After the contract had been broken, the defendants are alleged to have conspired to have the hauling business of the Tea Company done by the defendants Hannon and Kenny, who were to employ members of Local Union No. 249 for the operation of their trucks in the business. This is one of fifty-one like actions filed by individual truckers having substantially similar contracts with the Tea Company, and which are asserted to have been terminated at the same time and in the same manner.

The case under consideration is the only one of these cases which has been brought to trial. The first trial, before

Judge Kennedy, resulted in a compulsory non suit which was later taken off. The second trial lasted for nine weeks, and after the jury had deliberated for nearly one hundred hours, it was discharged, being unable to agree.

At the close of the trial, all of the defendants presented written points for binding instructions. Verdicts were directed in favor of the Estate of Joseph Kenny, deceased, and Scanlon, Arensberg and Michal as Trustees of Local No. 249 and individually. The motions of the other defendants were refused, and exceptions noted. Those defendants have moved for judgment in their favor upon the whole record under the Act of 1911, P. L. 70 (12 PS sec. 684) and these motions are now before us for consideration.

The defendants as to whom the case went to trial may be classified into three main groups:

1. The Great Atlantic & Pacific Tea Company, hereinafter designated as "A & P;"

2. (a) General Teamsters, Chauffeurs, Stablemen, Helpers and Garagemen, Local Union No. 249, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, an unincorporated association, hereinafter designated as the "Union" or "Local 249", (b) the president (Mazon), vice-president (Rosenthal), recording secretary (Gradeck), secretary-treasurer (Marshall), the trustees (Scanlon, Arensberg and Michal) as officers, and (c) Mazon, Rosenthal, Gradeck, Marshall, Scanlon, Arensberg and Michal, as individuals; and

3. M. J. Hannon and Hazel Kenny, Executrix of the Estate of Joseph Kenny, deceased.

On these motions, it is our duty to review the evidence, and consider it in the light most favorable to the plaintiff, giving him the benefit of every fact and inference which may reasonably be deduced therefrom pertaining to the issues involved. Judgment may be entered for any of the defendants only if binding instructions should have been given in his or its favor at the trial.

Conspiracy is a combination or agreement between two or more persons to do an unlawful thing, or to do a lawful thing in an unlawful manner. There must be a common purpose supported by a concerted action, and each must have the intent to do the unlawful thing. That intent must be common to all, and each must understand that the other has that purpose. A conspiracy may be proved by acts and circumstances sufficient to warrant an inference that the unlawful combination had been in point of fact formed for the purpose charged: Ballantine vs. Cummings, 220 Pa. 621, 630 (et seq.).

While conspiracy may be proved by circumstantial evidence, the evidence must be full, clear and satisfactory. The mere fact that several parties happened to exercise independent rights at or about the same time does not constitute an actionable conspiracy: Morris vs. Halford, 352 Pa. 138; Rosenblum vs. Rosenblum, 320 Pa. 103. Mere suspicion or the possibility of guilty connection is not sufficient, nor proof of acts which are equally consistent with innocence: Rosenblum vs. Rosenblum, supra.

It must be kept in mind that the term "conspiracy" retains, in Pennsylvania at least, its derivative meaning of "breathing together." Some of the decisions in other jurisdictions seem to require but a mere pursuit of the

same object to warrant a finding that a conspiracy existed, but this is not the law in this state. As has been stated, proof of the exercise of independent rights at the same time will not support a finding of actionable conspiracy. There must be a combination, and agreement, a breathing together, and concerted action towards the common purpose. Willes, J., in Mulcahy vs. Reg. (1868) L. R. 3 H. L. 306, advised the House of Lords that "a conspiracy consists not merely in the intention of two or more but in the agreement of two or more * * *. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself and the act of each of the parties, *promise against promise, actus contra actum, capable of being enforced if lawful,* punishable if for a criminal object or for the use of criminal means."

The determination of the sufficiency of the evidence is first for the court (Ballantine vs. Cummings, 220 Pa. 621). We must review the testimony and determine if there is contained therein evidence which will clearly, fully and satisfactorily establish agreement between the parties—evidence which is not consistent with innocence, and which raises more than a mere suspicion of concerted action toward the common objective of breaking the plaintiff's contract.

In the original statement of claim filed in this case plaintiff averred (Paragraph 9) that Mazon, Rosenthal, Marshall, Gradeck, Scanlon, Arensberg and Michal, individually and as officers and members of Local 249, and each of the members of Local 249, conspired together with others unknown, to prevent the A & P from carrying out the

contract with the plaintiff and to compel the A & P to cancel its contract with him, which result was effectuated by force, violence, threats and coercion directed against the plaintiff, and against others having similar contracts, and the A & P. It further averred that, as a result of these actions of the conspirators, A & P cancelled its contracts with the plaintiff and the other independents, "which it would not have done excepting as it was compelled to do by the force, violence, threats and coercion so exercised, employed and used by the other defendants."

Subsequently, the amended statement was filed. As we understand that pleading, some time subsequent to July 12, 1937 (the date of the written contract), defendants entered into a conspiracy having for its object the breach of the contracts with the independents, including that with the plaintiff, and the subsequent hiring of Hannon and Kenny to haul all of the A & P goods, using drivers and helpers who were members of Local 249. Pursuant to the agreement, and in order to effectuate its object, the Union, through its officers and members, planned and put into operation a campaign of force, violence, threats and oppression whereby the independents were prevented from doing any further hauling for A & P. It is averred that the Union, as part of the conspiracy "to injure the plaintiff and his associates," refused to receive plaintiff and his associates into membership in Local 249, even though some of the independents tendered to the proper officers the required initiation fees and dues.

The Thirteenth paragraph of the Statement of Claim (as amended) avers that on or about October 13th, 1937, the defendants, "particularly the members of Local 249,"

instituted a reign of terror on the highways of the state, and by violence so extensive as to constitute a riot and open rebellion against the constituted authorities, intimidated the plaintiff and prevented him from carrying out the contract with the A & P, although he was willing, able and ready to do so.

Plaintiff further avers that the A & P, pursuant to the conspiracy, refused to permit him and the other independents to haul, and gave its business to Hannon and Kenny, who were operating with union drivers who were members of Local 249. By reason of this act, done in pursuance of the conspiracy, plaintiff was unable to haul for A & P after October 13, 1937. On July 1, 1938, A & P formally cancelled the contract.

There are over twenty-three hundred pages of testimony in the plaintiff's case, and much of that testimony is cumulative. It will be impossible to recite the details of that testimony. However, we believe that a fair synopsis, interpreted most favorably to plaintiff, is as follows:

Plaintiff and a number of other independent truckers began to haul for A & P about March, 1935, during a period when the members of Local 249 were on strike against Hannon, Kenny and other haulers who had formerly transported goods for A & P. These independent haulers furnished their own trucks, plaintiff driving his truck and furnishing his own helper. In June, 1935, the strike against Hannon, Kenny and others was settled, the agreement containing a provision that Hannon and the others would give preference to union labor in their operations. Thereafter, the union members (and some non-union) working for Hannon and Kenny, and the

independents transported the merchandise for A & P. On July 12, 1937, the independents, including plaintiff, entered into separate written contracts with A & P to haul A & P merchandise from its warehouses to various retail stores. Hannon and Kenny appear to have entered into similar contracts.

The contract of July 12, 1937, provided, inter alia,

> "This contract, and any renewal thereof, may be cancelled by either party by giving the other party ten days' notice in writing."

The independent truckers did the hauling efficiently and economically, and A & P was well satisfied with the arrangement. The relations between the independents and A & P were cordial. A & P provided means whereby the independents bought gasoline and accessories at a discount, and it helped them with compensation and other insurance matters. As late as September 22, 1937, A & P prepared and filed for the plaintiff and other independents their applications for permits to transport goods as contract haulers with the Public Utility Commissions of Pennsylvania and West Virginia. The advantage of these contracts and the cooperation of A & P with the independents was corroborated by the A & P in defense, and plaintiff's testimony and that of the A & P both establish that the A & P's hauling costs were increased enormously after the independents were replaced by truckers employing union men.

Sometime in September, 1937, one of the members of Local 249 told one of the independents who had bought a new truck that the Union had discussed a drive to take over the A & P hauling from the independents. During the

week beginning October 10, 1937, officers and members of Local 249 began to stop the independents on main highways of the district and prevented them from reaching the A & P warehouse as well as threatened, and in some cases, attacked them. On Sunday, October 10, 1937, one of the independents was stopped at the Sewickley bridge by a group of forty or fifty men, some wearing buttons of Local 249, led by Rosenthal, the Union's vice president. He was ordered by Rosenthal to "turn around". On the following Tuesday night the trucks of a number of independents were followed and stopped. One was asked if he had a Union card, and advised that if he did not he would have to go back, because the Union had "taken over" and the independents were "through". Other independents were stopped and some of them or their drivers were attacked. Some of the independents, including plaintiff and his helper, were stopped and taken to Union headquarters, presumably to file applications for membership. When it was discovered that they hauled for A & P their applications were refused.

On the same night, October 12, 1937, a large crowd of men, some wearing Local 249 buttons, gathered near the 43rd Street warehouse, and there, led by business agents or officers of the Union, they stopped some of the trucks of independents which were being taken to the A & P warehouse to be loaded. There was some violence, one of the trucks being burned, the driver, William Shussett (an independent) severely beaten, and Foote, superintendent of the A & P warehouse was attacked after he had identified himself.

There was testimony by plaintiff's witnesses that the A & P employees refused to load the few trucks of the independents which reached the warehouse platform. They

did, however, load the trucks of certain haulers which were driven by members of other teamsters unions. One of these drivers was stopped, but when he produced his union credentials, he was permitted to proceed.

Hannon, according to plaintiff, was at the 43rd Street warehouse that evening, and directed his trucks, driven by members of Local 249, into the platform. Two men, wearing Local 249 buttons asked him if he was having any trouble, and Hannon said "No".

As a result of these actions, the independents were unable to load their trucks, and goods which had been placed on the loading platforms at the A & P warehouses by its employees had to be taken back to storage. Some of these were perishable and foodstuffs such as produce and baked goods were damaged or spoiled, with resulting loss to the A & P. On October 14, 1937, a committee representing the independent haulers met with R. R. King, Vice President in charge of the Pittsburgh Unit of the Central Division of A & P, to discuss the hauling situation and the conduct of the Union. King, who had previously told the committee that no merchandise would be moved until the trouble had cleared up, advised some of the independents that A & P would pay up to $200 a man to get each of the independents and their helpers into the Union, a total approximate cost of $30,000. He further advised them that he intended to make that offer to the attorney for the Union with whom, King said, he thought "money would talk".

Some of the independents volunteered to haul goods from the 43rd Street warehouse, but King, fearing bloodshed, refused to let them move. Instead, A & P called in

Hannon, Kenny and other truckers who employed union help, and asked them to provide extra trucks. Hannon leased a number of trucks for this hauling and for a period of about two weeks subsequent to October 13, 1937, he was furnishing fifty-two trucks to the A & P instead of the usual two to thirteen trucks which he had furnished while the independents were hauling. After the two week period, the number of trucks furnished by Hannon was decreased, and at the end of the year he was furnishing from ten to twenty-four trucks a day to A & P. Neither Kenny, Hannon or the other unionized truckers could purchase or lease sufficient trucks to do all the hauling required by A & P, and about November 6, 1937 A & P, directly or through Hannon, purchased certain of the trucks from the independents, and operated them with union labor.

The morning following his conversation with the committee of the independents, King told this group that he had not had any success with the Union, and that they would have to have Union buttons if they wished to haul for the A & P. From testimony offered by the plaintiff, through officers of the Union on cross examination, it appears that after King's offer of $200 a man to get the independents into the Union, King discussed the possibility of securing Union labor from Local 249.

Following this second conversation with King, some of the independent haulers went to Union headquarters. One of them handed his application for membership, together with an initiation fee of $27.50 to Earl Bohr, business agent for the Union. Bohr read the application, then tore it up and returned the money, stating that he "did not want any part" of the independents. Another

witness stated that he prepared his application, but when he informed a clerk in Union headquarters that he worked for the A & P, the clerk destroyed the application, saying "Why didn't you tell me that before?" On Friday evening, October 15, 1937, a number of the independents met in a garage on Shakespeare Street, where they were addressed by Mr. Cowie, an employee of A & P, whom King had promised to send over to the meeting. Cowie there told the independents that they were through hauling for A & P and that Hannon and Kenny were taking over the hauling; that they might as well sell their trucks to Hannon and Kenny, for without the A & P hauling, the trucks would be white elephants on their hands. Cowie said that Hannon and Kenny would be at the garage the next morning to buy trucks from the independents.

On Saturday morning a number of independents were at the Shakespeare Street garage for the purpose of selling their trucks to Hannon and Kenny. Hannon and a son of Kenny were at the garage, but each received a telephone call and left shortly afterwards. A mob, led by Bohr and Rosenthal, forced its way into the garage and a fight began. Some of the men in the mob wore buttons of Local 249 and some, including Bohr and Rosenthal, carried tire irons which they pulled out of their sleeves as they entered the garage. Some of the independents were injured and one of them was knocked unconscious. Bohr and Rosenthal were injured and taken to a hospital. Their expenses, including medical attention, were paid by the Union.

The independents did no further hauling for the A & P. In June, 1938, the plaintiff and other independents were notified by the A & P of a hearing before the Interstate

Commerce Commission on their applications for permits for contract hauling, which had previously been prepared and filed for them by A & P. A & P's traffic manager offered to provide representation for the independents at this hearing. None returned the authorization. On July 1, 1938, the A & P formally terminated the contracts with the independents, including the plaintiff.

First taking up the evidence against A & P, we must determine if that evidence is legally sufficient to establish that A & P was a party to a conspiracy to destroy plaintiff's contract.

We are of opinion that the record is entirely devoid of evidence that A & P was a party to a conspiracy prior to and including the night of October 12th-13th, 1937. It is true that there is some testimony that one of the employees of A & P advised Griffin, one of the independents, against buying a new truck (R., p. 288) and also told Schillo (R., p. 808) on October 12, 1937, to make his truck do for a while until "things blowed over." This latter conversation was had in the light of the independents having been stopped on the road (R., p. 808) a fact which was known to practically all of the independents.

The record establishes that the relationship between A & P and the independents was pleasant, and that A & P was well satisfied with the efficient and economical service which it was getting. The only reasonable inference from the testimony relative to the night of October 12th concerning the activities at the 43rd Street warehouse is that A & P was as much surprised at the suddenness of the Union drive as the independents. It had its normal complement of employees on hand and everything "went on as usual"

(R., p. 552). Perishable and other produce was brought to the platform for the independents to load, and some of this was damaged when the independents did not pick it up. During the two week period which followed, A & P had to call on a number of out of town haulers to transport the merchandise which the independents had been hauling, and conditions were "chaotic." Many of the retail stores could not be supplied for a time, and the hauling and transportation costs were increased enormously immediately after October 12th.

That testimony is certainly not clear and satisfactory toward the proposition that A & P had entered into a collusive combination with the Union and Hannon prior to October 12th, 1937. It is unreasonable to suppose that A & P would have entered into such an agreement, when its only result would have been to destroy a system of hauling which was efficient and economical and increase its hauling costs. The natural inquiry in such an examination as this is why, if A & P was a party to such a conspiracy, it did not take precautions to have its goods moved from the warehouse on the night of October 12th by those same haulers which it later called upon. Why did it go to the cost and trouble of setting its goods out on the platforms if there was an agreement that the independents would be prevented from hauling on that particular night? We think the answer is obvious, and that A & P had no knowledge of any attempt to prevent the independents from hauling until the blow came.

The plaintiff contends, however, that the evidence establishes that the A & P entered into the conspiracy after the night of the 12th, because (1) it desired to avoid

a repetition of its experience in the strike of 1935, when it spent half a million dollars in helping Kenny and Hannon fight the Union, and (2) it was compelled to accede to the demands of the Union and cancel the contracts with the independents because of the threats, violence and intimidation which the Union employed.

There is testimony that the A & P called in unionized truckers, including Hannon and Kenny, after October 12th, and that King had told Hannon to purchase some new trucks because he intended to give him more business. There is also testimony that King, on his visit to Union headquarters to make the offer of $200 a man for the independents, also requested union labor (R., pp. 1857, 1860). According to the plaintiff, King refused to let the independents operate until the trouble blew over, and he sent Cowie, an A & P employee, to the Shakespeare Street garage on Friday evening to tell the independents that they were "through" and that they had better sell their trucks to Hannon and Kenny.

In our opinion, this testimony does not warrant a finding of conspiracy insofar as A & P is concerned. A conclusion therefrom of a prior collusive combination is not only unwarranted—it is unreasonable. To find upon such evidence that A & P subjected itself to loss and litigation by entering into a profitless conspiracy to get rid of the independents is to disregard the fact that the relations with them were pleasant and cordial, and that it could have disposed of this very economical and satisfactory system, had it wished to do so, without liability or damage by giving ten days' written notice of cancellation under the terms of the contracts. If we are to interpret the testimony

to accord with plaintiff's theory that A & P was a reluctant, but nevertheless an active, participant in the unlawful enterprise because it feared the wrath of the Union and the consequences of an attempt to operate with non-union drivers, an essential element of conspiracy is lacking. The testimony does not warrant any finding that there was a breathing together, or combination acting in unison toward a common objective, insofar as A & P is concerned. It cancelled the contracts with the independents because the independents were prevented from hauling, and called in haulers who used union labor, but this is but required practice for any business in like circumstances. Bringing in unionized truckers was a right which A & P could exercise, even though it may have subjected itself to suits for breach of contract from the independents. That it exercised that right independently of the Union's drive, does not make it a party to a conspiracy with the Union. Whether the plaintiff and the other independents can recover damages for a breach of contract is not before us. What we are holding is that the fact that A & P called in other truckers to haul its merchandise because of a fear that the independents would not or could not do that work for it by reason of the activities of the Union, does not make it a party with the Union in a conspiracy to break the contract.

Plaintiff's position that A & P is liable as a conspirator if it cancelled the contracts through fear of the threats of the Union and a desire to avoid violence, is premised upon certain decisions of jurisdictions other than Pennsylvania. These include Aberthaw Construction Co. vs. Cameron, 194 Mass. 208 (1907); South Wales Miners Federation vs. Glamorgan Coal Co., 1905 A. C. 239; Walker

vs. Cronin, 107 Mass. 555 (1871); Lehigh Structural Steel Co. vs. Atlantic Smelting & Refining Works, 92 N. J. E. 131 (1820); Central Metal Products Co. vs. O'Brien, 278 Fed. 827 (1922); Eyak River Packing Co. vs. Huglen, 143 Wash. 229; and Buyer vs. Gullian, 271 Fed. 65 (1921).

Aberthaw Construction Co. vs. Cameron, 194 Mass. 208, was an equity suit for an injunction to restrain the officers and members of a carpenters union from inducing a defendant corporation to break its contract with the plaintiff for the construction of a building, and to restrain the corporation from breaking such contract and to enjoin all of the defendants from interfering with any of the persons employed by the plaintiff, and from combining and conspiring to compel the plaintiff to employ only union labor. The conspiracy charged and proved was a combination to coerce the Construction Company to accede to the demands of the defendants that the plaintiff employ only members of the carpenters union. The defendant corporation, having been informed of the demands of the carpenters union upon the plaintiffs, sought to persuade the plaintiff to avoid future difficulty by discharging the employee, prompted solely by reason of its pecuniary interest that there should be no unreasonable delay in the completion of its church building. Plaintiff having refused to comply with the wishes of the corporation, the corporation broke the contract with the plaintiff. It was held that evidence of the breaking of the contract, taken in connection with the action of the other defendants, of which the corporation had knowledge, was an important element in the general scheme of the conspiracy, and the injunction was allowed. As will be noted, the Massachusetts court recognized the principle that in the unlawful combination, there must be a mutual

understanding whereby all the conspirators worked together for a common end. The court also held that the fact that the corporation attempted to persuade the Construction Company to avoid further difficulty with the labor union by discharging such employee, did not make the corporation a co-conspirator with the carpenters union in seeking the discharge of such employee.

Lehigh Structural Steel Co. vs. Atlantic Smelting & Refining Works, 92 N. J. E. 131, was decided in 1920, on the principle that a closed shop labor contract is against public policy and void. There the plaintiff attempted to restrain interference with its performance of a building contract. It charged the defendant with conspiring to compel plaintiff to use union labor. On the theory that a closed shop was illegal, it was found that defendant's architect and the defendant had co-operated with the unions in preventing the complainants from employing non-union men. Since that decision, closed shop agreements have been declared legal in New Jersey (East Co., vs. Oystermens Union, 130 N. J. E. 292, 21 Atl. (2) 799 (1941)) and in Pennsylvania (Schwartz vs. Laundry, etc., Union, 339 Pa. 353, 357; Brown vs. Lehman, 141 Pa. Super 467, 473).

Whatever may have been the import of Aberthaw Construction Co. vs. Cameron and the other decisions cited by plaintiff at the particular times and in the jurisdictions they were decided, they are neither apposite nor controlling in the present case, nor in accord with the Pennsylvania decisions. The yardstick of Pennsylvania's "full, clear and satisfactory" proof was not applied to the evidence, and in our opinion the decisions do not reflect the

modern judicial attitude regarding the rights and liabilities of the parties affected by present day labor controversies.

As concerns Hannon, the plaintiff's testimony indicates that Hannon was employing Union drivers and that he continued to haul for A & P during the activities of the Union. On the night of October 12th, he was at the 43rd Street warehouse and two of the union members inquired of him if he was having any trouble and he replied in the negative. Hannon was present at the Shakespeare Street garage on the following Saturday morning to purchase trucks from the independents, but he left after receiving a telephone call. Previously, on October 13th, Hannon had told Margaret L. Kennedy, his secretary and manager, that King had told him to see if he could purchase some new trucks, that he expected to give him more business, and that Hannon bought two trucks and operated them in the A & P business, using drivers furnished by Local 249.

Hannon's business increased greatly immediately after the independents quit hauling and for a two week period he had a large number of his own and leased equipment hauling merchandise for A & P. He was unable to purchase sufficient trucks to maintain such a force, and the number of trucks was substantially reduced after a two week period. Hannon's rates, as well as those of Kenny and the other truckers who were hauling in the emergency, were increased. From that testimony the inference may reasonably arise that Hannon did benefit by the inability of the independents to haul for A & P.

Much of the evidence against Hannon was circumstantial in its nature. He was called as for cross examin-

ation by the plaintiff, and the trial judge permitted him to testify at large concerning his activities. To the extent that his testimony was not contradicted, plaintiff is bound (Morris vs. Halford, 352 Pa. 138). A review of plaintiff's testimony convinces us that it was insufficient to establish that Hannon was a party to a conspiracy. There is no evidence which would justify a conclusion that any of Hannon's acts were done in furtherance of an agreement with the Union, or with the Union and A & P, to destroy the business of the plaintiff. It is certainly as consistent to say that Hannon, under the evidence, took a lawful advantage of a situation which arose unexpectedly and which resulted in an increased business for himself. It does not follow that because Hannon was unionized and thus benefited by the independents' misfortune, that he was a party to a combination which set out to destroy the business of the independent haulers. It seems to us that he, too, was exercising a perfectly lawful and independent right in accepting as much business as he could handle, and in purchasing or leasing equipment for the expanded operation. The testimony upon which the plaintiff relies to implicate Hannon in a conspiracy is, in our opinion, neither full, clear nor satisfactory, and it is insufficient to submit to a jury upon the question of Hannon's participation in the conspiracy charged in the pleadings.

As we view the testimony, the three groups of defendants are shown to have pursued three separate and independent objectives. The A & P was interested in delivering merchandise to its retail stores; Hannon was furnishing as many trucks as he could toward the hauling of this merchandise; and Local 249 was desirous of replacing the independents with its own members. We have considered

the liability of A & P and Hannon under the testimony offered by the plaintiff, and now we must consider whether or not the other defendants—the Union, its officers and members, and those individual defendants identified with the Union—are implicated by the evidence in an actionable conspiracy. We are of opinion that an unincorporated association, its officers and its individual members, may be joined as conspirators in an action. Our question, as regards Local 249 and the defendants associated with it, is whether or not the testimony shows that any two of the "Union" group joined together in a conspiracy to bring about the destruction of the plaintiff's contract.

From the plaintiff's evidence it appears that some of the Union men were not satisfied with Hannon's performance of the agreement which had been signed in June of 1935, when the strike against him had been settled. They also had their eyes on the A & P hauling. The subject of the independents had been discussed at certain of the meetings of the Union in the summer of 1937. One of the independents (Griffin) was advised in September, 1937, that his truck would not look so beautiful in about a month, and that the Union had discussed a drive to take over the A & P hauling.

Between two and three o'clock on the morning of Monday, October 11th, one of the independents (Lewis) was stopped near the Sewickley bridge by a crowd of forty or fifty men, some wearing Local 249 buttons, led by Rosenthal. Rosenthal told Lewis, when he learned that he had A & P goods on his truck, that if he knew what was good for him he would turn around and take the load back.

On the night of October 12th and the morning of the

13th a large crowd of men assembled near the 43rd Street warehouse. Some of these men wore Local 249 buttons and during that night various groups prevented independents from reaching the warehouse. The evidence is clear that there was a great deal of violence and that various independents were stopped and attacked by men wearing Local 249 buttons. Some of the independents, including the plaintiff and his brother, were directed to Union headquarters. Arriving there and presenting their applications for membership in the Union, their applications were refused.

On the following Saturday, according to the testimony of the plaintiff, a large crowd of men, some wearing Local 249 buttons, and led by Bohr (business agent) and Rosenthal (vice president of the Union) attacked a number of independents in the Shakespeare Street garage. Both of these individuals were injured in the melee and were taken to a hospital. Their hospital and doctor bills were paid by the Union. There was testimony that Marshall, the secretary-treasurer of the Union, was in the vicinity of the garage that morning, and there was other testimony which implicated him in some of the violence which took place on Tuesday night and Saturday morning.

As a result of the drive, A & P hired contractors who employed union labor to haul its goods, and the contracts between A & P and the independents were not performed.

There is no doubt that the Union had the right to initiate a drive to unionize the A & P hauling contractors, and to promote by lawful collective action the common interest of its members. It had the right to attempt to induce A & P to operate a "closed shop" with respect to

its hauling. The Union, as such, is not liable for unlawful acts of its individual officers, members or agents, unless it be established by a preponderance of the evidence that (a) such unlawful acts were done by its officers, members or agents and (b) that it actually participated in or authorized such acts, or ratified them after actual knowledge: Act of June 2, 1937, P. L. 1198, sec. 8, 43 PS, sec. 206h.

The Union, however, would be liable if it entered into a conspiracy with its officers, members and others, to do an unlawful act, and particularly would it be liable if it adopted and directed a program of violence to prevent the independents from carrying out their contracts with the A & P, and became, through its officers and members, a participant in the conspiracy or ratified the agreement after actual knowledge. But it will bear repeating that mere suspicion is not evidence. And the actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question: U. S. v. White, 322 U. S. 694.

Plaintiff contends that he has established that the Union was a party to the unlawful conspiracy, arguing that the evidence will support findings that Local Union No. 249 as such

1. Planned a campaign of force and violence having for its purpose the ousting of the independents, at meetings prior to October 10, 1937, particularly at a meeting held in September of that year;

2. Directed its officers and members in the doing of unlawful acts of violence designed and perpetrated to prevent the independents from operating;

3. Ratified the unlawful acts of its operators and members by

a. Refusing to accept the independents into membership;

b. Approving expenditures of Union funds

(I) for carrying out the unlawful operations of the officers and members; in one case without requiring production of receipts for an unitemized bill of $5,000;

(II) for paying hospital and medical expenses of Bohr and Rosenthal, officers who had been injured in an unlawful attack on the independents at the Shakespeare Street garage;

(III) for paying its attorney an excessive fee ($2,500) "in final payment A & P strike trouble," but actually made for services rendered in making an agreement with A & P for the ouster of the independents, in favor of Union members;

c. Accepting the benefits of the acts of violence which brought about the cancellation of the contracts of the independents.

The first contention under consideration is that the evidence warrants a finding that the Union planned a campaign of force and violence at its meetings. In his brief, plaintiff asserts

"The minutes of Local 249 show that as early as September 13, 1937, there was a discussion with reference to the situation at the A & P."

To support this statement, plaintiff refers to the minutes of the Union of September 13, 1937, which read:

"President Mazon spoke about these men at Hannon's and explained the situation to our body."

Plaintiff's brief further asserts:

"We offer the following definitely proven facts * * * sufficient to have been passed on by the jury: * * *

2. Definite advance information from a member of the Union that a reign of violence was to be instituted for the purpose of depriving the plaintiff and his fellow independents of their contracts with the A & P."

The evidence cited to support this assertion is:

"Q. What was your conversation with John Holleran about a month before October 13, 1937?

A. Why, I parked in front of my home and just pulled up and parked the truck and this fellow came along driving a produce truck for another company and stopped in his truck, too, and admired the truck. He said, 'It is a beautiful looking truck, Joe, but a month from now it won't look so beautiful.' And I asked him the reason why, and he said, 'Down at our meetings it was the main topic that the Union organization would have a drive on and take over the A & P hauling.' "

We are urged to accept as "full, clear and satisfactory" evidence of the Union's participation in a conspiracy the testimony that the Union president (Mazon) talked to members about certain unidentified men at *Hannon's* and the "situation" regarding them, and that a member of

the Union told an independent that at "our meetings" the topic of discussion was a proposed drive to take over the A & P hauling. We are asked to infer:

1. That Mazon was actually speaking of the independents and suggesting that their work be taken over by a campaign of force and violence;

2. That the Union adopted his recommendations and officially sanctioned the campaign;

3. That the "topic of discussion"—the drive to take over the A & P hauling—included plans involving force and violence, and that these were definite and not conclusions that Holleran had reached in his own mind;

4. That the Union conspired with its officers and members to bring about the cancellation of the plaintiff's contract by unlawful means.

We cannot agree with this interpretation. For all we know, Holleran may have amplified the plans for the "drive" by the addition of his own conceptions of what was necessary to make its successful. As we read the testimony, it establishes at best that a drive to take over the A & P hauling was discussed at the meetings Holleran attended. Whatever assumptions Holleran may have made as to the effective means for conducting the drive, they are not binding upon the Union, in the absence of evidence of his participation in the carrying out of the concept and the Union's ratification thereof.

Another example of basing a presumption upon a presumption is found in plaintiff's statement that "carte blanche authority to members of the Union in their reign

of violence (is shown) in statement of President Mazon to independent Aldridge at page 44, 'It all depends on how the boys feel whether you come back or not.' "

This statement occurred during a conversation between Mazon and Aldridge at Union headquarters. Aldridge told Mazon that he wished to join the Union, and, having been asked if he had $25, he tendered that amount. Mazon replied, "We don't want it." Mazon then told a man to take Aldridge back to where he had been stopped. Aldridge testified:

> "Before I left I asked if he could give me a note of some kind to show, if I got stopped, so I wouldn't have to come back to the office. He said, 'I can't do that.' I said, 'Well, I'm not coming back here.' He said, 'It depends on how the boys feel whether you come back or not.' "

This is the testimony upon which plaintiff relies to establish that the Union gave "carte blanche authority" to its members to commit acts of violence. We are asked to infer (1) that Mazon, the president, had authority from the Union to direct a program of violence, and (2) that he meant by his statement that Aldridge would be stopped again on the highway and brought back even against his will. It might be presumed that Mazon was acting for the Union in refusing to accept Aldridge into membership, but we cannot follow the reasoning which interprets his reply to Aldridge to mean only that the members should go as far as they liked in stopping the independents on the highways.

There are many acts of violence and unlawful conduct

described in the testimony, and the evidence might permit the finding that they were committed by individuals who were officers and members of the Union, but we cannot agree that there is sufficient—and certainly not "clear, full and satisfactory"—proof that the Union, as such ever planned or participated in the unlawful acts. In this connection we may add that the plaintiff's evidence would warrant a finding that there was no labor dispute at the A & P, and the provisions of Section 8 of the "Labor Anti-Injunction Act" of 1937, P. L. 1198, 43 PS sec. 206 (h), would not be applicable in that event. However that may be, judging the testimony by the ordinary standards of evidence and giving the plaintiff the benefit of every reasonable inference and presumption, we believe that the testimony is neither in quantity nor quality sufficient to permit a jury to pass upon the Union's part in a conspiracy.

The next phase of plaintiff's argument has to do with the Union's alleged ratification of the unlawful acts of violence committed by its officers and members. One of the reasons advanced is that the Union ratified the refusal of its officers to accept the independents as members, and thereby became a party to the conspiracy. We cannot agree with this position. A trade union has the right to prescribe qualifications for membership and to restrict or limit the members to be admitted. No person has an abstract or absolute right to membership: Cameron v. Int. Alliance T. S. E., 118 N. J. Eq. 11, 176 A. 692; 31 Am. Juris. 861, sec. 58. Plaintiff cites Dorrington v. Manning, 135 Pa. Super. Ct. 194, in support of his position that the Union was not justified in refusing membership to him and to the other independents. There is small comfort in that authority for him. In the discussion of that case,

Judge Baldrige referred to provisions of a collective bargaining *agreement* by which existing employees should be retained and become members of the newly formed union, and by which new employees should become members within sixty days. He said:

> "Appellants complain of the chancellor's interpreting that section to mean that the union was bound thereunder to accept as a member any person whether then in the employ or hired thereafter by the employer. We do not construe the section to mean that the defendant association is obliged to admit to its membership every one subsequently employed by the Coach Company. That question, however, is not involved in this appeal as we are only considering the rights of the plaintiffs * * * "

Our attention has been called by the plaintiff to Schwartz v. L. & L. S. Drivers' Union, 339 Pa. 353. We have examined that decision, but fail to find therein any authority for the position that a trade union has no right to restrict its membership.

Plaintiff next refers, as proof of the Union's ratification of the unlawful acts of its officers, to the testimony regarding its official approval of an expenditure of $5,000. The argument appears to be that since no receipts were offered to support this expenditure, the money was used for unlawful purposes in ousting the independents. This inference is drawn from testimony that a similar organization drive earlier in 1937 cost the Union only a few hundred dollars. Plaintiff urges that "This was most certainly a question of fact for the jury to determine why the drive in October,

which netted 676 new members, cost $5,000 in miscellaneous expenditures. It is definite evidence of ratification by the Union membership, because under the by-laws of the Union this requires the approval of the membership."

It is a long jump from the finding of an approval of an unitemized bill for $5,000, to a finding that the amount was spent by the officers of the Union to conduct a campaign of force and violence against the independents and that their actions were approved by the Union without question. The burden was on plaintiff to establish ratification. He cannot do that by proving that the Union approved payment of a bill which he cannot explain. It does not follow that because the expenditure was approved, unlawful acts were also approved. The money may have been used for purposes which were entirely lawful, and the fact that it was in excess of what had been spent in a more successful campaign may point only to the fact that directors of the campaign did not use the money wisely, or that the campaign was more expensive to conduct than former ones. We do not know—and plaintiff has not directed our attention to any testimony from which it can be reasonably inferred—that any part of this money was used for unlawful purposes of a conspiracy. Suspicion is not proof.

The same conclusion must be reached after consideration of the testimony regarding the payment of a large fee to Frankel, the attorney for the Union. Plaintiff argues that since Frankel had been paid in full to March, 1937, and thereafter had received a retaining fee of $100 per month from the Union, the payment of $2500 by a check marked "Final payment A & P strike trouble" can mean

only that it was, as he urges in his brief, "for the sole purpose of rewarding Frankel for the deal that he had engineered with R. R. King which resulted in the ousting of the plaintiff and his associate independents." According to plaintiff, the approval of this payment, and thereby the sanctioning of the "deal," made the Union a party to the conspiracy. From testimony that Frankel was later given the sum of $1,000 as a gift for his work for the Union, plaintiff infers that "the membership as a whole ratified Frankel's acts in negotiating with the A & P Tea Company." Frankel had represented some of the Union leaders at hearings in Criminal Court, had stated that the independents would never gain membership in the Union, had refused King's offer of $200 a man for the independents to join the Union, and had finally made an agreement, according to the plaintiff's testimony, whereby the A & P engaged itself to employ Union drivers. The Union membership could approve all of those acts and not become a party to a conspiracy to breach the plaintiff's contract. Even though Frankel may have charged an excessive fee, and have been the recipient of undeserved gifts, the inference is just as reasonably drawn that the Union either thought he deserved them or was mistaken in its estimate of the value of his services.

Plaintiff further contends that proof of ratification of the unlawful acts of the Union's officers and members is the payment of the hospital expenses of Bohr and Rosenthal, officers who had been injured in making the assault on the independents at the Shakespeare Street garage. We cannot agree with the plaintiff that the Union ratified the actions of Rosenthal and Bohr. If the plaintiff's testimony is true, the conduct of these men was unlawful, but we

have been referred to no authority which holds that sympathy is evidence of approval or that the payment of hospital bills of a person injured in committing a tort amounts to a ratification of the wrongful act.

In this overlong opinion we have endeavored to present the argument of the plaintiff in as much detail as practical. We have done this not only because of the voluminous testimony, but also because this is the first of a large number of companion cases which have been filed, and, when reviewed by the appellate court, will probably be the lodestar or gauge for them. Much of the testimony is not cited because of its cumulative nature. However, the general picture of the evidence relied upon by the plaintiff in his argument against the motions has been presented and discussed.

We are all in accord that the motions of the Great Atlantic & Pacific Tea Company, M. J. Hannon, Local Union No. 249, and Jerry Gradeck for judgment on the whole record must be granted. As to Mazon, Marshall and Rosenthal, there is division, a majority of the court being of opinion that there is not sufficient evidence to warrant a verdict against them under the pleadings. A separate order will be entered as to their motions.

Opinion of the Court of Common Pleas
Order of Court; Exception
Order of Court

ORDER OF COURT

And now, July 30, 1946, the motions of The Great Atlantic & Pacific Tea Company, a corporation, General Teamsters, Chauffeurs, Stablemen, Helpers and Garage Men, Local Union No. 249, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, an unincorporated association, and of M. J. Hannon and of Jerry Gradeck for judgment in their favor on the whole record, having come on to be heard, upon consideration of said motions, it is ordered that said motions be and they are hereby granted, and upon payment of the verdict fee, judgment is directed to be entered in favor of each of the said defendants respectively against the plaintiff.

BY THE COURT
J. A. R.

Eo die, exception to plaintiff and bill sealed.

JOSEPH A. RICHARDSON (SEAL)
Judge.

ORDER OF COURT

And now, July 30, 1946, the motions of B. C. Mazon, President, M. Rosenthal, Vice President, and Scott F. Marshall, Secretary-Treasurer, officers of Local Union No. 249, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, and as individuals, defendants named in the above entitled case, for judgment

in their favor on the whole record having come on to be heard, upon consideration thereof it is ordered that said motions be and they are hereby granted, and upon payment of the verdict fee, judgment is directed to be entered in favor of each of said defendants, respectively, against the plaintiff.

BY THE COURT,

K.—A.

Richardson, J., dissents from the above order.

Eo die, exception to plaintiff and bill sealed.

JOHN J. KENNEDY
RUSSELL H. ADAMS
J. J.
per J. A. R.

Plaintiff's Exhibit 1

V.

FIFE'S CONTRACT WITH A. & P., PLAINTIFF'S EXHIBIT 1

July 12, 1937

MEMORANDUM OF AGREEMENT between The Great Atlantic & Pacific Tea Company, a corporation incorporated under the laws of New Jersey, hereinafter referred to as the "A&P" and *William E. Fife, Cannonsburg, Pa.* hereinafter referred to as the "Carrier".

1. The Carrier agrees to conform to the rules, regulations and all requirements of the Interstate Commerce Commission and any State Regulatory Body having jurisdiction over motor vehicle transportation for hire as performed by the carrier.

2. The A&P agrees to engage the Carrier to transport goods, wares and merchandise as dealt in or used in connection with its operations or those of its subsidiaries as, when and where the A&P may require such transportation to be performed and for which the Carrier is or may be qualified under the law, during the term of the agreement and the A&P agrees to have the Carrier transport not less than 3,700,000 pounds per year.

3. The Carrier agrees to receive and safely carry and transport for the A&P not less than 3,700,000 pounds per year of such goods, wares and merchandise from points of origin to destinations that may be designated by the A&P and to deliver such goods, wares and merchandise to the points of destination within a reasonable time.

Plaintiff's Exhibit 1

4. The Carrier shall receive, load, unload and deliver such goods, wares and merchandise as may be designated for transportation by the A&P.

5. It is mutually understood that this Agreement covers the transportation of any goods, wares and merchandise which may be entrusted to the Carrier by the A&P, between, from or to points within and throughout such territory or territories as may be designated by the A&P, which solely for the purpose of general location of the territory or territories in which transportation is to be performed, is described as between, from or to the territory and area within the scope of the operations of the A&P Warehouse in the City of Pittsburgh, State of Pennsylvania, or wherever such warehouse may be relocated or the scope of its operations in anywise redefined.

6. The Carrier agrees to pay the A&P for any loss of or damage to said goods, wares and merchandise, while in possession of said Carrier, except such loss or damage as may be occasioned by the fault of the A&P for the inherent nature of the goods.

7. It is further understood that the Carrier is an independent contractor and not an employee of the A&P and that all persons operating vehicles or employed in connection therewith, owned, leased or hired by the Carrier, are employees of the Carrier and not employees of the A&P.

8. The Carrier shall at all times carry and keep in force public liability, property damage, cargo and workmen's compensation insurance with such reliable companies or with the State, whichever is legal, and in such amounts and limits, as will be approved by the A&P, endorsed so as to cover the interests of the A&P as they may appear, and

such as will also meet the requirements of Federal and State Regulatory Bodies having jurisdiction.

9. It is understood that the A&P has the exclusive advertising rights on the Carriers' trucks hauling and handling the A&P's goods. The Carrier shall have its name and address in connection with the words as "owned and operated by" appear on the vehicle, or with the words of similar import.

10. It is understood that the charges paid the Carrier by the A&P for transportation, including the receiving, loading, unloading and delivery of goods, wares and merchandise by the Carrier will not be lower than an average charge of .084 per weighted ton mile for the ton mile transportation performed during the term hereof. It is further understood that the Carrier and the A&P may from time to time agree or determine on charges or schedules of charges in excess of such minimum charge which at all times shall be the fair and reasonable value of the service rendered based upon and varying with the type of service, the flow of tonnage and the territory involved and served.

11. It is further understood and agreed that this contract shall be in effect for a period of one year from the date hereof and is automatically renewed each year for another period of one year, unless cancelled at any time as hereinafter provided. This contract, and any renewal thereof, may be cancelled by either party by giving the other party ten days' notice in writing.

12. This agreement shall be binding on the heirs, administrators, executors and assigns of both of the parties hereto.

Plaintiff's Exhibit 1

IN WITNESS WHEREOF, the parties hereto have caused these Presents to be duly executed this 12th day of July 1937.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY.

By (Signed) B. J. Jordan
Traffic Manager
(Signed) Wm. E. Fife

WITNESS:
(Signed) Harold B. Ikelman

Sworn to and subscribed before me this 12th day of July, 1937.

(Signed) M. E. Gullen (Seal)
Notary Public

My commission expires March 9, 1939.

(Notary Public Seal Attached)

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BRIEF IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI

To the Honorable the Chief Justice and Justices of the Supreme Court of the United States:

Respondents, Local Union 249, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, an unincorporated association, hereafter referred to as "Local 249", and B. C. Mazon, Scott F. Marshall and M. Rosenthal, individually and as officers of Local 249, respectfully present the following Brief in Opposition to the Petition for Writs of Certiorari to the Supreme Court of Pennsylvania.

William E. Fife, Plaintiff and Petitioner, asks this Honorable Court to review the final judgments of the Supreme Court of Pennsylvania in an action instituted by him against the respondents above-named, and the Great Atlantic & Pacific Tea Company, a corporation, and others, for the recovery of damages alleged to have been sustained by him as a result of a conspiracy among the several defendants (*Fife v. A & P, et al.*, 52 A. 2d 24). While the Petitioner in his Statement of the Matters Involved (pages 3 to 11), sets forth his version of the facts in the case, we respectfully submit that all the questions of fact have been settled by the decision of the Pennsylvania Supreme Court: *Atchison T. & S. F. R. Co. v. Matthews, et al.*, 174 U. S. 96, 19 Supreme Court 60. The opinion of the Supreme Court was not a lengthy one, but it adopted the opinion written by Judge Richardson of the Court below (p. 39)

and therefore incorporated by reference all of the facts found by Judge Richardson. This latter opinion is printed by the Petitioner in his Brief at pages 77 to 107, inclusive.

The jurisdiction of this Court to review a decision of the Supreme Court of a State is conferred by *Section 247 of the Judicial Code* (28 U.S.C.A. 344). No constitutional question was argued by either the petitioner or the respondents before the Supreme Court of Pennsylvania. Therefore, in order to sustain his position that this Court review the adverse judgments of the Supreme Court of Pennsylvania, the Plaintiff below must rely upon his Petition for Re-argument presented after the State Supreme Court had made its final order affirming the judgments of the Court of Common Pleas of Allegheny County. The primary question resolved itself into a simple one: Did the Supreme Court of Pennsylvania violate any constitutional guarantee in the plaintiff when it refused to grant him a reargument as prayed for?

CONSTITUTIONAL QUESTION URGED TOO LATE FOR CONSIDERATION BY FEDERAL SUPREME COURT

Is the petitioner estopped from urging that the action of the said Supreme Court in failing to give consideration and grant a reargument as petitioned for was itself unconstitutional? There was only one ground for reargument, and that was that Section 8 of the *Pennsylvania Act of June* 2, 1937, P.L. 1198, 43 PS 206h, was unconstitutional, being in violation of the 14th *and* 5th *amendments* to the

Argument

Constitution of the United States and *Article I, Section* 2 *and Article* III, *Section* 7 of the *Pennsylvania Constitution.*

The general rule is that a constitutional question is urged too late if put forward for the first time upon a petition for rehearing: *American Surety Co. v. Baldwin Company,* 287 U.S. 156 53 Supreme Ct. 98; *Godchaux Co. v. Estopinal,* 251 U.S. 179 40 Supreme Ct. 116.

In the case of *Ethel M. Dorrance, et al. v. Commonwealth of Pennsylvania,* 309 Pa. 151 (163 A. 303), this Court made the following order (53 Supreme Ct. 222):

> "December 5, 1932. Petition for Writ of Certiorari to the Supreme Court of the State of Pennsylvania denied upon the ground that the federal question was not properly presented to, and was not passed upon by the Supreme Court of Pennsylvania."

There are several exceptions to the general rule, one of which is that the rule is inapplicable where the constitutional question was considered and decided, and the other, where the grounds of the original decision below supply new and unexpected basis for claim by the defeated party of denial of a federal right: *Great Northern Railroad Company v. Sunburst Oil & Refining Company,* 287 U.S. 358, 53 Supreme Ct. 145-149. In our case the constitutional question was not considered and decided by the State Supreme Court on the petition for rehearing, because the Petition for Reargument was refused. As to whether the grounds of the decision of the State Supreme Court supply new and unexpected basis for a claim of the denial of a federal right, we will examine the said decision to ascertain whether the position taken by the petitioner can be sustained.

Argument

The Act of 1937 P.L. 1198 is known as the "Labor Anti-Injunction Act." Section 8 of the said act, which is the section about which complaint is made, provides as follows:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as herein defined, shall be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members or agents, except upon proof beyond reasonable doubt in criminal cases, and by the weight of evidence in other cases, and without the aid of any presumptions of law or fact, both of—(a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof by such association or organization."

Obviously the applicability of this section of the Act is limited to the Union, that is, Local 249, and the three officers who are named as defendants. The Petitioner opens his argument at page 28 with the following statement:

> "Section 8 of the Act of 1937 was injected into this case by the Supreme Court of Pennsylvania when the lower court had entered judgments upon the record against your Petitioner and had held that under the facts of the instant case the statute had no application. The lower court in its opinion at page 36 of the Atlantic Reporter stated: 'In this connection we may add that the plaintiff's evidence would not warrant a finding

that there was no labor dispute at the A & P and the provisions of section 8 of the Labor Anti-Injunction Act of 1937 P.L. 1198 43 PS 206h would not be applicable in that event.' "

The above quotation from the opinion of the Court below per Judge Richardson is only a small portion of the same. The Act of 1937 was not injected into this case by the Supreme Court of Pennsylvania, as is shown by the following quotation from the Opinion of the Court of Common Pleas as it is printed in the Petition for the writ (p. 97-98) and which will be found in 52 A 2d at page 34, and which also was quoted in our argument before the Supreme Court of Pennsylvania as set out in Brief for Appellees, Local Union 249, B. C. Mazon, Scott F. Marshall and M. Rosenthal," at pages 45 and 46. This portion of the Opinion of the court below reads as follows:

"There is no doubt that the Union had the right to initiate a drive to unionize the A & P hauling contractors, and to promote by lawful collective action the common interest of its members.

It had the right to attempt to induce A & P to operate a 'closed shop' with respect to its hauling. The Union, as such, is not liable for unlawful acts of its individual officers, members or agents, unless it is established by a preponderance of the evidence that (a) such unlawful acts were done by its officers, members or agents and (b) that it actually participated in or authorized such acts, or ratified them after actual knowledge: Act of June 2, 1937, P.L. 1198, sec. 8, 43 PS §206h.

> The Union, however, would be liable if it entered into a conspiracy with its officers, members and others, to do an unlawful act, and particularly would it be liable if it adopted and directed a program of violence to prevent the independents from carrying out their contracts with the A & P, and became, through its officers and members, a participant in the conspiracy or ratified the agreement after actual knowledge. But it will bear repeating that mere suspicion is not evidence. And the actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question: United States v. White, 322 U.S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542, 152 A.L.R. 1202."

At page 34 of his argument in this court the Petitioner makes the following observation:

> "The record was to be examined upon the theory by which the case had been tried in the court below",

referring to *Weiskircher v. Connelly*, 256 Pa. 387 100 A. 965. He then states (page 35):

> "Was that done in the instant case? Most certainly not."

Let us see whether his conclusion is correct.

The record in this case discloses that in March of 1940 the above action was filed at Number 2679, January Term, 1940, in the Court of Common Pleas of Allegheny County, Pennsylvania. It was so proceeded in that in March of 1943 a trial was had which lasted two weeks and resulted in a record or transcript comprising 1170 typewritten pages.

Argument

At the close of the plaintiff's case, the defendants were granted compulsory non-suits. Plaintiff moved to have them removed and when the case came up for argument his counsel, in conformity with a rule of Allegheny County Court of Common Pleas, presented to the court en banc a Statement of Facts and Questions to be argued. The latter are as follows:

1. Does Section 8 of the Labor Anti-In[illegible]ction Act of June 2, 1937, P.L. 1198, apply in this case?

2. Was a prima facie case made out against the defendants?

At the argument before the court en banc, the plaintiff's attorney not only argued the question of the constitutionality of Section 8 of the Act of 1937, but he presented to the court an elaborate brief containing 85 pages and one of the subjects argued is the matter under the following heading:

"Does Section 8 of the Labor Anti-Injunction Act (Act of June 2, 1937, P.L. 1138: 43 PS 206h) accord with the provisions of Section 11 of Article 1 of the Constitution of Pennsylvania, with the Fourteenth Amendment of the Constitution of United States, the Fifth Amendment of the Constitution of the United States, the seventeenth paragraph of Section 7 of Article 3 and Subdivision 14 of Section 7 of Article 5?"

Under this heading, plaintiff's counsel argues practically the same questions as to constitutionality which he is urging before this court, excepting, of course, the later action of the Supreme Court of Pennsylvania in not considering its Petition for Reargument.

Argument

On December 18, 1943, the compulsory non-suits were set aside "for the reason that some of the defendants who were called as witnesses by the plaintiff were not interrogated on some of the allegations set forth in their Affidavit of defense." The Opinion in support of the order taking off the non-suits contains the following language:

> "The Trial Court granted judgment of compulsory non-suit for the reason that the evidence and exhibits of the plaintiff at that time, in his opinion, did not show that the alleged conspiracy was proven by full, clear, and satisfactory testimony. See Ballantine v. Cummings, 220 Pa. 621; Novic, et al. v. Fenics, et al., 337 Pa. 529; Rosenblum v. Rosenblum, et al., 320 Pa. 103. *The Court also took into consideration the provisions of the Labor Anti-Injunction Act of* 1937, *P.L.* 1198, and *the amendment to that Act, viz. the Act of* 1939 P. L. 302, for the reason that this suit was not instituted until December, 1939, and the original Statement of Claim was not filed until April 1st, 1940."

The second trial, which began January 21, 1946, required 3,493 typewritten pages of testimony. In the Charge to the jury at page t. 3530 we find the following words:

> "In order to hold the union liable as an association, you must first find that the officers and members committed unlawful acts in a conspiracy, and then you must find that the union through its members participated in or *actually authorized* those unlawful acts in the conspiracy or ratified the acts *after actual knowledge* of them, and in determining whether or not there was any ratification of the acts of

the officers or member of the union by it, you will take into account all of the testimony which has been presented, including the oral testimony, the minutes of the meetings of the union and the actions recited therein, together with the exhibits. Plaintiff points to the payment of the hospital bills of Bohr and Rosenthal by the union, the gifts to Frankel, the reference of the independent drivers to the headquarters of the union, the actions of men wearing buttons with the number 249, and other evidence which he contends shows *actual authority and ratification* of the acts of the individual members and officers by the union itself. You will consider all of the testimony in the case in order to determine whether or not there has been *actual authority* for unlawful acts in a conspiracy or ratification of them."

Again at page t. 3547 when speaking of punitive damages, which might be assessed against the union, the charge states:

> "There must be evidence, *without the aid of presumptions*, that the acts were done wilfully and wantonly by the officers and members, and that the union participated in, *actually authorized, or ratified those* acts after *actual notice* of them by the union."

At the close of the charge a number of additional requests were presented by the several parties, among which was one on behalf of Local 249 and its officers to the effect, first--that there was a labor dispute between Local 249, Hannon & Kenny and the A & P Tea Company, and second, that if the jury finds that a labor dispute did

exist between Local Union 249 and the A & P Tea Company and/or Hannon and Kenny, that no officer or member of Local 249 and neither Local 249 participating or interested in a labor dispute, shall be held responsible or liable in this civil action for the alleged unlawful acts of individual officers, members or agents except upon proof by the weight of the evidence and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons, officers, members or agents of Local 249, and (b) actual participation in or actual authorization of such acts or ratification of such acts after actual knowledge thereof by Local 249.

The additional points were refused and exceptions noted (T. 3578).

It will be noted from the portion of the Charge quoted, that the burden placed upon the plaintiff as to actual knowledge and ratification and actual authority, actual notice, etc., is exactly the same as that required by the Act of 1937; also, when speaking of punitive damages, the trial judge instructs the jury that there must be evidence "without the aid of presumptions" that the acts were done wilfully, etc., following the exact wording of the Act of 1937. After almost 100 hours deliberation, the jury was unable to reach an agreement and was discharged by the trial judge. Motions for judgment upon the whole record under the Pennsylvania Act were then made and granted, the opinion written by Judge Richardson is the one printed in the plaintiff's Petition for Certiorari now before the court (p. 77-107). While the Act of 1937 was referred to by the defendants in their briefs before the lower court, the question of the constitutionality of Section 8 of the said act

was not raised by the plaintiff in his argument, oral or written contra the judgments. Upon his appeal to the Supreme Court of Pennsylvania, he again failed to bring before that court the question of the constitutionality of Section 8 of the Act of 1937. The opinion of the Supreme Court, which adopted the opinion of the Common Pleas Court will be found in 52 A 2d 24 as above noted.

When he presented his petition for reargument, plaintiff made the following pertinent statement (p. 75):

> "We further request such a reargument, or in the event of no reargument, we respectfully request this Court to deliver an opinion as to the constitutionality of the section of the Act of 1937, above referred to, in order that the record in this case may be perfected for an appeal to the Supreme Court of the United States of America."

Taking into consideration the above facts and that Section 8 of the Act of 1937 had been continually before the parties and the court since the first trial in 1943 how can the plaintiff explain why he found it necessary to ask the Supreme Court of Pennsylvania on a petition for reargument after an adverse decision, to deliver an opinion as to the constitutionality of the Section of the Act of 1937, "in order that the record in this case may be perfected for an appeal to the Supreme Court of the United States of America."

The simple answer is that after the non-suits were set aside as above indicated without the court expressing an opinion on the constitutionality of Section 8 of the said Act, the plaintiff's counsel decided to abandon that ques-

tion and it did not occur to him that it might be important until the final judgments of the Supreme Court of Pennsylvania were entered against his client. Therefore, under the decisions of your Honorable Court, the Petition for Reargument had no legal or factual foundation upon which to rest and was properly denied.

Also, the inference that the Pennsylvania Supreme Court based its decision upon the Act of 1937, by the statement by petitioner that the said court *applied* the Act, is not borne out by a consideration of the entire paragraph embodying the sentence quoted by the Petitioner.

In referring to the Opinion of the Pennsylvania Supreme Court, he quotes the following at page 29:

> "In dealing with the evidence said to support the charges against the Union and the three officers, it is necessary to consider section 8 of the Act of June 2, 1937, P.L. 1198, 1202 43 PS 206h."

The entire paragraph, as found at page 39 of 52 A 2d, reads:

> "With respect to Appeal No. 144, from judgment in favor of Union No. 249, and the Appeals No. 148, 149 and 140, from judgment in favor of Mason, Marshall and Rosenthal, officers of the union, the elements of the question for consideration are somewhat different from those presented in the case against the A & P. In dealing with the evidence said to support the charges against the union and the three officers it is necessary to consider section 8 of the Act of June 2, 1937, P.L. 1198, 1202 43 PS §206h. With respect to Appeal No. 146 from the refusal to take off the non-suit entered on the

motion of the executrix of Joseph Kenny, plaintiff encountered an additional difficulty, Kenny's death closed plaintiff's mouth. As to these four appeals, we also agree that the evidence does not measure up to what the rule requires. We realize from our consideration of the evidence and from what is said in the elaborate briefs of argument, that in presenting a case like this there was, and probably always will be, difficulty in supplying the measure of proof required by the law, but we may not for that reason relax the settled rule. We therefore adopt the opinion written by Judge Richardson; we may add that while the members of the learned court below were not unanimous with respect to Mason, Marshall and Rosenthal, we all agree that in the case of each appeal the judgment appealed from must be affirmed."

It will be noted that the Supreme Court makes the following statement:

"We realize from our consideration of the evidence and from what is said in the elaborate briefs of argument, that in presenting a case like this there was, and probably always will be, difficulty in supplying the measure of proof required by the law, *but we may not for that reason relax the settled rule.*"

As to what the "settled rule" in Pennsylvania is, we quote the Opinion from the same page

"It has long been the settled rule in this Commonwealth that proof of conspiracy must be made by full, clear and satisfactory evidence. The mere fact that two or more persons, each with the right to do a

thing, happen to do that thing at the same time is not by itself an actionable conspiracy: Rosenblum v. Rosenblum, 320 Pa. 103, 181 A 583."

The case of *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 50 S. Ct. 451, upon which the Petitioner relies, has no application to this case as will be seen from the following reference to the said decision:

The Supreme Court of Missouri in the case of *Laclede Land & Improvement Co. v. State Tax Commission,* 295 Mo. 298, 243 S.W. 887, had decided that the Tax Commission had no authority to hear the complaint of the Laclede Company, and that if such a power had been conferred on the commission, the statute granting it would have been in violation of the Constitution of Missouri. The Laclede case was authority until it was overruled in the Brinkerhoff-Faris case. As said by the Supreme Court of the United States at 453 in the Brinkerhoff case:

"No one doubted the authority of the Laclede case until it was expressly overruled in the case at bar. * * *

It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense.

The plaintiff asserted an invasion of its substantive right under the federal Constitution to equality of treatment. * * * In order to protect its property from being seized in payment of the part of the tax alleged to be unlawful, the plaintiff invoked the appropriate judicial remedy provided by the state. * * *

Under the settled law of the state that remedy was the only one available."

It was held by the Missouri State Court in the Brinkerhoff Case that no judicial remedy was open to the plaintiff other than that before the State Tax Commission, but at the date of the decision of the case, the Commission could not grant such relief to the plaintiff because the time within which it could act had long expired. Therefore, it is obvious now, in the Brinkerhoff Case the United States Supreme Court would grant certiorari and would decide the case as it did.

In our case the Pennsylvania Supreme Court did not apply the Act of 1937 in such manner that its action prevented the plaintiff-petitioner from pursuing any remedy he had prior to such decision; he met Section 8 of this Act in the very beginning of his case and it continued with him up until the final decision of the Supreme Court; he well knew this fact and also the plain unambiguous provisions of the act. The opinion of the lower court in taking off the compulsory non-suit gave him no assurance that the Act would not be applied to the new trial; the conduct of the second trial shows that it was again before all the parties. When the Supreme Court of Pennsylvania referred to the Act of 1937 in its opinion it did no more than had been previously done by the court below when it took off the compulsory non-suits. It must be remembered that the appeals before the Supreme Court of Pennsylvania were initiated not by the defendants, but by the plaintiffs. He had the right to argue that Section 8 of the Act of 1937 was unconstitutional, but he did not see fit to do so.

Argument

If the decision of the Supreme Court of Pennsylvania in applying the Act of 1937 had been to the advantage of the Petitioner; if the Court had found that because of the Act of 1937, and the requirement of proof to be merely by the "preponderance of the evidence",—rather than by that which is "full, clear and satisfactory",—the Union and its officers would be liable for the acts of others, and if the Union and the officers had prayed for a Writ of Certiorari for the very same reason as set out by the Petitioner, your Honorable Court would most certainly have denied the same.

Taking into consideration all of the facts in the history of this proceeding relative to this Act of 1937, the petitioner cannot now, with good grace, plead surprise and claim such prejudice as would excuse his laches. We respectfully submit, therefore, that the petitioner is too late to seek relief from this Court as prayed for, and also, we urge that the Supreme Court of Pennsylvania did not base its decision upon the said act, but only mentioned it in connection with the evidence against the Union and its officers. Therefore, under the decisions of your Honorable Court, the Petition for Certiorari should be denied.

However, we will attempt to show that the Supreme Court of Pennsylvania did not violate any constitutional guarantee in the petitioner when it refused his petition for reargument.

Argument

NO VIOLATION OF ANY RIGHT GUARANTEED TO PLAINTIFF BY CONSTITUTION OF UNITED STATES OR OF PENNSYLVANIA

All of the reasons urged for granting the writs and all but number 4 of the "Questions Presented" in the Petition for Writs of Certiorari relate to the action of the Supreme Court of Pennsylvania in, as alleged by Petitioner, applying section 8 of the Act of 1937 to the case at bar. Number 4 of the Questions Presented raises the matter of the constitutionality of said section 8 of the Act of 1937. Therefore, we will first consider whether the section of the Supreme Court of Pennsylvania in thus applying section 8 of the Act of 1937 violated any provision of the Constitution of the United States.

The Petitioner alleges the sections of the Federal Constitution as violated to be the *Fifth, Seventh* and the *Fourteenth* Amendments.

The Fifth Amendment to the Constitution, U.S.C.A. p. 172, provides among other things, that "no person shall be * * * deprived of life, liberty or property without due process of law."

In *Palko v. State of Connecticut,* 302 U.S. 319, 58 Supreme Ct. 149, it is held that the Fifth Amendment is not directed to the States, but solely to the Federal Government, therefore it has no application to this case.

The Seventh Amendment, U.S.C.A. p. 379, provides:

"In suits at common law where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved and no fact tried by a jury, shall be

otherwise re-examined in any court of the United States, then according to the rules of the common law."

The Petitioner sets forth that he has been prejudiced by the alleged action of the State Supreme Court in applying to his case an Act which provides rules of evidence different from those of the common law after the case had been submitted to the jury under common law rules of evidence, and in re-examining the facts other than according to the rules of the common law.

In this case, judgments on the record were entered by the court below after disagreement of the jury, as permitted by Pennsylvania Act of April 20, 1911, P.L. 70, 12 PS section 684. These judgments were affirmed by the Supreme Court of Pennsylvania, and the Petitioner does not raise any question as to the constitutionality of the said Act of 1911. There is no question but that that Act is constitutional, as well as similar action taken in a federal court under Rule 50 of the new Rules of Civil Procedure: *Domarck v. Bates Motor Transport Lines*, 93 F. 2d, 522-524, based upon *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 55 S. Ct. 890; *Galloway v. U.S.*, 319 U.S. 372, 63 S. Ct. 1077.

As to the power and authority vested in the Supreme Court of Pennsylvania to apply the Act of 1937 to the instant case and also to re-examine the facts in this common law action, other than according to the rules of the common law, we respectfully refer the court to the opinion written by Mr. Chief Justice White in the case of *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211, 36 S. Ct. 595 at 596 as follows:

Argument

"Two propositions as to the operation and effect of the 7th Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable, (a) *That the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action.* We select from a multitude of cases those which we deem to be leading; Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Fox v. Ohio, 5 How. 410, 434, 12 L. ed. 213, 223; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. ed. 223; Brown v. New Jersey, 175 U.S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Twining v. New Jersey, 211 U.S. 78, 93, 53 L. ed. 97, 103. And, as a necessary corollary, (b) *that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same.* Livingston v. Moore, 7 Pet. 469, 552, 8 L. ed. 751, 781; Supreme Justice v. Murray (Supreme Justice v. United States) 9 Wall. 274, 19 L. ed. 658; Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487; Walker v. Sauvinet, 92 U.S. 90, 23 L. ed. 678; Pearson v. Yewdall, 95 U.S. 294, 24 L. ed. 436. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to

say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning."

To the same effect are *Chesapeake & Ohio Railroad Co. v. Kelly*, 241 U.S. 485, 36 S. Ct. 630-631; *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 43 S. Ct. 589-591.

The 14th Amendment to the Constitution which is found in U.S.C.A. p. 69, provides among other things: "Nor shall any state deprive any person of life, liberty or property without due process of law."

This Amendment applies not only to the States, but also to the Courts of the State, and therefore, we will attempt to show that the Supreme Court of Pennsylvania did not deprive the plaintiff of property without due process of law, nor deny to him the equal protection of the law.

(a) Due Process

In the first part of this Brief, in urging that the Petitioner was too late in raising alleged constitutional questions, we called attention to the fact that *Section* 8 of the *Act of* 1937, the *Pennsylvania Labor Anti-Injunction Act*, had been before the Court and the parties hereto at all stages of the case, had been referred to in the Opinion of the Court below and in the argument for the appellee before the Supreme Court and therefore, the plaintiff must have anticipated that the Supreme Court might mention it in its opinion, as it did. This being so, the refusal to grant a

re-argument so that the Act might be brought before it for special consideration was not a violation of the 14th Amendment, in denying this plaintiff due process. He suffered no injury by reason of the refusal of the Court to consider the constitutionality of the Act. As a matter of fact, the application of that Act would give him an added advantage over the defendants, because it required merely that he prove his case by "a preponderance of the evidence," and while the words "without the aid of any presumptions of any law or fact" are inserted in the Act, this particular provision refers only to (a) the doing of such acts by persons who are officers, members or agents of the association; and (b) actual participation in, or actual authorization of, or ratification of such acts after actual knowledge by the association. The only complaint made by the Petitioner is the use of the words, "and without the aid of any presumption of law or fact." Those words are surplusage, because the subjects to which they apply, as above noted, require evidence of the *actual* doing of such acts, participation in, authorization of, or ratification after *actual* knowledge. Striking out of the Act "and without the aid of any presumptions of law or fact," the requirement for responsibility or liability of the Union or its officers for the actions of the persons mentioned is exactly the same. In speaking of responsibility of the Union and its officers, the Common Pleas Court in the Opinion written by Judge Richardson and which was adopted by the Supreme Court of Pennsylvania as above noted, based its decision largely upon the case of *U. S. v. White*, 322 U. S., 694, 64 S. Ct. 1248 (52 A2d 24 at page 34) and this application of the Federal law was made by the Court after a reference almost verbatim to section 8 of the Pennsylvania Act of 1937. The

decision in the White case on this particular question is as follows (p. 1252-1253):

> "Duly elected union officers have no authority to do or sanction anything other than that which the union may lawfully do; nor have they authority to act for the members in matters affecting only the individual rights of such members. The union owns separate real and personal property, even though the title may nominally be in the names of its members or trustees. The official union books and records are distinct from the personal books and records of the individuals, in the same manner as the union treasury exists apart from the private and personal funds of the members. See United States v. B. Goedde & Co., D.C. 40 F. Supp. 523, 534. And no member or officer has the right to use them for criminal purposes or for his purely private affairs. The actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question. At the same time, the members are not subject to either criminal or civil liability for the acts of the union or its officers as such unless it is shown that they personally authorized or participated in the particular acts. See Lawlor v. Loewe, 235 U. S. 522, 35 S. Ct. 170, 59 L. Ed. 341; Eagle Glass & Mfg. Co. v. Rowe, 245 U. S. 275, 38 S. Ct. 80, 62 L. Ed. 286."

Therefore, even without the Act of 1937, the Union and its officers would be protected against what might be called respondeat superior except upon the conditions mentioned in the White case, and therefore, the Petitioner suffered

no prejudice when the Supreme Court of Pennsylvania merely mentioned that, "In dealing with the evidence said to support the charges against the union and the three officers, it is necessary to consider section 8 of the Act of June 2, 1937, P. L. 1198, 1202, 43 PS 206h." That is every word in the Opinion as to the Act of 1937. It does not go into an elaboration of how the Act of 1937 shall be considered, but instead proceeds to finally decide the entire case according to "the settled rule" which is that "proof of conspiracy must be made by full, clear and satisfactory evidence" (Opinion p. 39).

The petitioner admits that the standard of proof required in a conspiracy case is that it be "full, clear and satisfactory". Why then is he objecting to the application of a rule of evidence which places upon him a much lighter burden of proof?

In *Snyderwine v. McGrath*, 343 Pa. 245, (22 A2d, 644 at 647), the Supreme Court of Pennsylvania adopts the following language from *Taylor v. Paul*, 6 Pa. Superior Ct. 496-501:

> "To instruct the jury that a fact must be established by 'the weight of the evidence' is not equivalent to saying that it must be established 'by clear and satisfactory evidence'. The latter implies a higher degree of proof than the former."

(b) Equal Protection of the Law

Petitioner claims that he has been denied "equal protection of the law" by the application of the Act of 1937, and this, because section 8 of the Act as he alleges sets up

a different standard of evidence when referring to associations or organizations. His position that this section might refer to any association or organization is not well taken because by the very terms of the Act, the term organization means, "every unincorporated or incorporated association of employers or employees."

In *Carras v. Monaghan*, 65 Fed. Supp. 658, the District Court for the Western District of Pennsylvania decided (p. 661) that:

> "The Acts of 1937 and 1939 (Pennsylvania Labor Anti-Injunction Act) were Pennsylvania procedure statutes well within the power of the State legislature to enact. To say that the Federal constitutional rights of the plaintiff have been violated by the amending Act of 1939, (adding two exceptions to section 4 of the Act) is tantamount to declaring that the ancient chancery powers of the Pennsylvania Courts also violated the constitutional rights of individuals in case of labor disputes."

This case also holds that the "due process clause" does not guarantee to the citizen of a State any particular form or method of State procedure.

In *Dohany v. Rogers*, 281 U. S. 362, 50 S. Ct. 299 the opinion at 302 reads:

> "Nor does the equal protection clause exact uniformity of procedure. The Legislature may classify litigation and adopt one type of procedure for one class and a different type for another."

In *Landay v. U. S.*, 108 F2d 695-706 (Certiorari denied, 60 Supreme Ct. 721) the Circuit Court of Appeals for the

Sixth Circuit Court adopts the following from the opinion in *Hass v. U. S.*, 93 F2d 427-437:

> "The provision of the act which prevents a retroactive application did not make the act inapplicable at the time this case was tried. *No one has a vested right in any existing rule of evidence.* Congress and the Legislatures of the States may modify and control rules of evidence and may apply new rules to pending causes of action, provided a party is not deprived of his right to present his proof."

In an action under the Interstate Commerce Act to recover from a railroad company damages sustained by a shipper by reason of unreasonable rates and unjust discrimination, it was urged that the provision of section 16 of the Act that "the findings and order of the Commission shall be prima facie evidence of the facts therein stated upon.", is repugnant to the Constitution among other things, as a denial of due process of law. The opinion of the Supreme Court in this case, that is, *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 35 S. Ct. 328 at 335 reads

> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. *At most, therefore, it is merely a rule of evidence.* It does not abridge the right of trial by jury, or take away any of its incidents. Nor does it in anywise work a denial of due process of law. In principle it is not unlike the statutes in many of the states, whereby tax deeds are made prima facie evidence of the regularity of all the pro-

ceedings upon which their validity depends. Such statutes have been generally sustained."

In *Luria v. United States,* 231 U. S. 9, 34 Supreme Ct. 101 p. 14, the Supreme Court adopts the following quotation from Cooley's Constitutional Limitations, 7th Ed. 524:

> "It must also be evident that a right to have one's controversies determined by existing rules of evidence is not a vested right. These rules pertain to the remedies which the state provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those states in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective, even though some of the controversies upon which it may act were in progress before."

In *Seaboard Air Line Ry. Co. v. Watson,* 287 U. S. 86 (53 Sup. Ct. 32) this Court held that the mere discrimination resulting from the application of a presumption of negligence (created by section 237 of the Judicial Code, 28 U. S. C. A. section 344), to a railroad company and the failure to provide a like rule in similar actions against carriers by motor for hire, or other litigants, did not violate the "equal protection" clause of the 14th Amendment.

Finally, in the late case of *Kotch v. Board of River Port Pilot Com'rs.* as reported in 67 Supreme Ct. 910 (advance sheet), your Honorable Court made the following pertinent observations as to this section of the Constitution at p. 912:

> "The constitutional command for a state to afford 'equal protection of the laws' sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task. A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. * * * Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be. For it is axiomatic that the consequence of regulating by setting apart a classified group is that those in it will be subject to some restrictions or receive certain advantages that do not apply to other groups or to all the public. * * * This selective application of a regulation is discrimination in the broad sense, but it may or may not deny equal protection of the laws. Clearly, it might offend that constitutional safeguard if it rested on grounds wholly irrelevant to achievement of the regulation's objectives. An example would be a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the regulated activities."

Therefore, section 8 of the Act of 1937, being a procedural statute, and presumptions being simply rules of

evidence in which no litigant has a vested right, under the foregoing decisions, does not offend against the Constitution of the United States. The Act of 1937 in itself being not unconstitutional then the action of the Pennsylvania Supreme Court in applying it to the case at bar, under the circumstances, as they existed in this case and were of record, could not be unconstitutional.

In his Petition for Reargument the Petitioner urged that section 8 of the Act of 1937 was a violation of article III., section 7, of the Pennsylvania Constitution which provides among other things:

> "The General Assembly shall not pass any local or special law: * * *
>
> Regulating the practice or jurisdiction of, or changing the rules of evidence, in, any judicial proceeding or inquiry before courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate."

To show that the Supreme Court of Pennsylvania did the Appellant no harm when it refused reargument and thus refused to consider whether or not the act was in accordance with the Pennsylvania Constitution, we will refer briefly to the following decisions of the Pennsylvania courts on this subject.

In order that the rule apply that the assembly shall not pass a law changing the rules of evidence, etc., such law must be a *local* or *special* law as distinguished from a

general law. If the Act is not special or local, it would not be unconstitutional.

In 1937, the Pennsylvania Legislature passed a companion act to the Labor Anti-Injunction Law, known as the Pennsylvania Labor Relations Act, adopted June 1, 1937, P. L. 68, 43 PS section 211. This Act was attacked as unconstitutional in the case of *Emp. of Local* 134 *v. Grant Co.*, 341 Pa. 70 (17 A2d 614), and the Supreme Court of Pennsylvania decided (p. 615) that the said Pennsylvania Labor Relations Act was general and not special legislation. The Labor Relations Act took away from labor unions and employers many rights in that among other things it subjected them to the authority of the Labor Relations Board. This Act most certainly might be considered special legislation with more reason than the Labor Anti-Injunction Act and particularly section 8 thereof, but the Supreme Court held otherwise and it is the last authority on that question. The general law as to special legislation is set out in the case of *Seabolt v. Commissioners*, 187 Pa. 118 (40 A. 818) at 323 as follows:

> "Legislation for a class distinguished from a general subject is not special but general, and classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine the courts cannot declare the classification void, though they may not consider it to be on a sound basis. The test is, not wisdom, but good faith in the classification."

Argument

The Act of 1937 not being "special legislation", none of the provisions of article III., section 7, apply.

Finally, the petitioner in his Brief (p. 32) has called attention to the provisions of the Federal Anti-Injunction Act (Norris-LaGuardia Act) stating particularly that the latter does not contain the phrase to which he objects so strenuously, namely, "And without the aid of any presumptions of law or fact". The Federal Act does not contain said phrase, but it does state that no officer or member or association shall be responsible for the unlawful acts of individual officers, members or agents, "*except upon clear proof* of *actual* participation in, or *actual* authorization of, such acts after *actual* knowledge thereof." Requiring clear proof of actual participation, actual authorization, or ratification after actual knowledge, should be just as objectionable as the proof required by the Pennsylvania Labor Anti-Injunction Act, but petitioner does not find it so. In fact, he could not legally object because Section 6 of the Federal Act was specifically upheld by this Court in the case of *United Brotherhood, etc. v. United States*, 67 Supreme Ct. 775 (adv. sheet) March 10, 1947, from which we quote as follows:

> "We hold that its purpose and effect was to relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization without clear proof that the organization or member, charged with responsibility for the offense, actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration.

Thus section 6 limited responsibility for acts of a co-conspirator—a matter of moment to the advocates of the bill. Before the enactment of section 6, when a conspiracy between labor unions and their members, prohibited under the Sherman Act, was established, a widely publicized case had held both the unions and their members liable for all overt acts of their co-conspirators. This liability resulted whether the members or the unions approved of the acts or not or whether or not the acts were offenses under the criminal law. While of course participants in a conspiracy that is covered by section 6 are not immunized from responsibility for authorized acts in furtherance of such a conspiracy, they now are protected against liability for unauthorized illegal acts of other participants in the conspiracy." (p. 780)

"We hold, therefore, that 'authorization' as used in section 6 means something different from corporate criminal responsibility for the acts of officers and agents in the course or scope of employment. We are of the opinion that the requirement of 'Authorization' restricts the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that the particular act charged, or acts generally of that type and quality, had been expressly authorized, or

necessarily followed from a granted authority, by the association or non-participating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence." (p. 781)

The purpose of this section of the federal law is stated thus in the Senate Report, No. 163, p. 19, 20, 72d Congress, 1st Session; and it might with propriety be applied to Sec. 8 of the Pennsylvania Act:

"It is not the intention of the bill to protect anybody, whether he be employer or employee, from punishment for the commission of unlawful acts either as against property or person. But no person or organization should be held thus liable unless he or it caused the unlawful act or participated in it or ratified it. * * * It is high time that, by legislative action, the courts should be required to uphold the long-established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts. As a rule of evidence, clear proof should be required, so that criminal guilt and criminal responsibility should not be imputed but proven beyond reasonable doubt in order to impose liability.

"There has been a distinct conflict of opinion in the courts as to the degree of proof required. Mere ex parte affidavits establishing a certain amount of lawless conduct in the prosecution of a strike have been held in some instances to establish a 'presumption' that the entire union and its officers were engaged in an

unlawful conspiracy; and, on the other hand, other courts have declined thus to substitute inference for proof, (and have rejected such a doctrine). * * *

"It is appropriate and necessary to define by legislation the proper rule of evidence to be followed in this matter in Federal Courts. That is the only object of section 6."

We respectfully pray the Court, therefore, to dismiss the Petition for Writs of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

CHARLES J. MARGIOTTI,

BEN PAUL JUBELIRER,

MARGIOTTI & CASEY,

Attorneys for Respondents, Local Union 249, and Its Officers.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

NO. 26 MISC.

WILLIAM E. FIFE, Petitioner,

v.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, a corporation, CHAUFFEURS, STABLEMEN, HELPERS and GARAGEMEN, LOCAL UNION 249, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN and HELPERS OF AMERICA, an unincorporated association, B. C. MAZON, President, M. ROSENTHAL, Vice-President, JERRY GRADECK, Recording Secretary, SCOTT F. MARSHALL, Secretary-Treasurer, C. SCANLON, Trustee, WILLIAM ARENSBURG, Trustee, CHARLES MICHAL, Trustee, INDIVIDUALLY AND AS OFFICERS and MEMBERS, REPRESENTING THEMSELVES AND ALL OTHERS HAVING THE SAME INTEREST, J. KENNY and M. J. HANNON, and HAZEL KENNY, Executrix of the Estate of J. KENNY, Deceased.

PETITION FOR REHEARING OF PETITION FOR WRITS OF CERTIORARI

EDWARD O. SPOTTS, JR.,
JOHN D. MEYER,
Attorneys for Petitioner.

632 Frick Building,
Pittsburgh, Penna.

SMITH BROS. CO. INC., LAW PRINTERS, 434-438 BOULEVARD OF ALLIES, PITTSBURGH, PA.

TABLE OF CITATIONS.

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PETITION FOR REHEARING OF PETITION FOR WRITS OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, William E. Fife, respectfully, requests a rehearing of his petition for writs of certiorari, denied by this Court on October 13, 1947.

The history of the case, the questions presented, the statutes and law involved, the specifications of error and the reasons for granting the writs are all set forth in the petition for certiorari and brief in support thereof, to which reference is made and will not be repeated here.

GROUNDS FOR GRANTING THE PETITION

Your petitioner feels that a serious error has been made by your Honorable Court in not granting certioraris as requested in this case.

Only the union and its officers filed an answer to the petition for certioraris, the other three defendants remaining silent. The union's answer does not deny the merits of your petitioner's case asserted in the trial court, but is confined to two points, first that no federal question is involved and second, if a Federal question is involved, your petitioner did not properly raise or preserve it in the State Courts.

Due to the vast size of this record, 3643 typewritten pages, including charge, requiring ten weeks trial, some matters were overlooked which we now feel should be called to this Court's attention.

I. Petitioner's Raising of the Federal Question Was Timely.

The respondent union has taken the position that Section 8 of the Act of 1937, P.L. 1138, has been continually present throughout the trial of this case since its inception. Sub-section 1 of Section 3 defines as follows:

> "1"—the term "organization shall mean every unincorporated or incorporated association of employers or employees."

Section 8 of the above act provides as follows:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as

herein defined, shall be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members or agents, except upon proof beyond reasonable doubt in criminal cases, and by the weight of evidence in other cases, *and without the aid of any presumptions of law or fact,* both of—(a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof by such association or organization." (Emphasis Ours)

The case was originally non suited on the basis of this section and the unconstitutionality of the said section was strenuously urged by counsel for your petitioner in asking the removal of the non suit. The non suit was removed without deciding the constitutionality of this section. All of this is admitted in respondent's answer brief.

The case then went to trial for a second time and we challenge counsel for the respondents to show one place in the entire 3493 typewritten pages of testimony where a single particle of testimony was excluded on the basis of Section 8, of the Act of 1937.

This act and this section apply only in the case of a labor dispute. To show the trial court's position in regard to the fact that your petitioner was not involved in a labor dispute, we call the Courts' attention to this part of the record, overlooked in our original petition and brief.

Examination of one of defendants, M. J. Hannon, by his counsel—Record pages 1465-1466:

"Q. Well now let us come down to October 13, 1937 when these independent truckers started to have labor difficulties?

Mr. Spotts: Objected to as stating a conclusion and not a question.

Objection sustained.

Mr. Oliver: I have not asked the question yet.

The Court: *The question is improper. The independents had no labor difficulties.* (Emphasis Ours)

The above was confirmed in the trial court's charge when it refused the points of the Union and its officers wherein they requested the benefit of Section 8 of the Act of 1937, viz: proof by the weight of the evidence without the aid of any presumptions of law or fact. (T. 3758).

It is further confirmed in the opinion of the court *en banc* where the trial judge stated at page 36 of the Atlantic Reporter, 52 A 2nd, the following:

"In this connection we may add that the plaintiff's evidence would warrant a finding that there was no labor dispute at the A & P., and the provisions of Section 8 of the Labor Anti-Injunction Act of 1937, P.L. 1198, 43 P.S. 206 h would not be applicable in that event."

In light of the above, what was this petitioner to do? A non suit based upon Section 8 of the Act of 1937 had been removed wherein its constitutionality had been argued although no opinion was expressed as to the constitutionality. The case then went to trial again and during a ten-week trial in which 3493 pages of testimony were taken, not a single iota of evidence was excluded

or admitted upon the basis of this Act and the Trial Court, in open court both in its ruling on evidence and in its refusal of points for charge, openly declared that no labor dispute existed in this controversy and reaffirmed its position in its opinion, handed down months later, as shown by the above quotation.

Should your petitioner in its appeal to the Supreme Court of Pennsylvania raise a matter that had not even entered into the trial of the case nor in the opinion for judgment on the record but had been expressly decided in your petitioner's favor when it was raised. We think that your petitioner's position in such a matter is so obvious and elementary that the position of the union in raising it is untenable.

Your petitioner had every reason to expect that the Supreme Court of Pennsylvania would examine the record upon the theory in which the case had been tried in the court below and was completely dumbfounded and surprised when the Supreme Court of Pennsylvania, in reviewing the record as to the union and its officers, affirmed the lower court by injecting into and making a basis of its decision, Sec. 8 of the Act of 1937, saying:

> "In dealing with the evidence said to support the charges against the Union and the three officers it is necessary to consider section 8 of the Act of June 2, 1937, P.L. 1198, 1202, 43 PS 206 h."

and then, in a footnote, reprinted verbatim the entire section. (52 A 2nd 39)

It is respectfully submitted that your petitioner raised the Federal question at the first opportunity in his petition for reargument before the Supreme Court of Pennsylvania. The lower court had held that your

petitioner was not involved in a labor dispute and therefore this section did not apply.

The Supreme Court of Pennsylvania did not follow the long established rule of reviewing the case on the theory upon which it was tried in the Court below, *Weiskircher v. Connelly,* 256 Pa. 387, but instead applied Sec. 8 of the Act of 1937, automatically holding that your petitioner was involved in a labor dispute, a completely different theory than the case had been tried and decided in the lower court and argued in the Supreme Court of Pennsylvania. This case is most certainly within the doctrine of *Brinkerhoff-Faris Trust & Savings Company v. Hill,* 50 Supreme Court 451, 281 U.S. 673, 1930 where Justice Brandeis at page 453 stated:

> *"The additional federal claim thus made was timely, since it was raised at the first opportunity."* (Emphasis Ours)

How anybody can state, in view of the negation of Sec. 8 by the trial court, not only in the taking of testimony, the charge and its opinion, that the injection of this unconstitutional act at the very end of the case by the Supreme Court of Pennsylvania, the first time this act had been held to apply to the instant case, was not the first opportunity of your petitioner to complain of its application and constitutionality, is beyond our comprehension.

II. A Federal Question Is Presented.

Respondent would have this Court believe that the degree of proof under Sec. 6 of the Norris-LaGuardia Act is as great, or greater, than under Sec. 8 of the Pennsylvania Act of 1937. The answer to such a proposition is found in this damnable part of the Pennsylvania Act not found in the Norris-LaGuardia Act:

> **"And without the aid of any presumptions of law or fact."** (Emphasis ours.)

We challenge counsel for the respondent to reveal to this Court one statute, Federal or State, which carries such a provision. We have searched carefully but have not found a single one. True, there are statutes which create presumptions, such as, the production of deeds are made *prima facie* evidence of the regularity of proceedings upon which their validity depends. These and like presumptions established by law are rebuttable, do not estop a defense and takes no question of fact from either the Court or jury as is stated in the case of *Meeker v. Lehigh Valley Railroad Company,* 236 U.S. 412, 35 S. Ct. 328. But measure the clause in Section 8 of the Pennsylvania Act above quoted, by the above standards cited in the *Meeker* case, and it is obvious that methods of proof, available to all litigants from common law and legislative sources, are not applicable against unions, their officers, members and agents involved in a labor dispute.

We are not contesting the constitutionality of Section 6 of the Norris-LaGuardia Act. Every piece of evidence eliminated by this iniquitous section of the Pennsylvania Act would have been admissible under Section 6

of the Norris-LaGuardia Act. Not only does the Norris-LaGuardia Act, not eliminate presumptions of law and fact, but the opinion of this Court in the case of *United Brotherhood etc. v. United States,* 67 Supreme Ct. 775 (Adv. sheet) March 10, 1947, supports our position that unions and others engaged in labor disputes are subject to such proof. We call the Court's attention to the following excerpt from the majority opinion by Justice Reed at page 783 as follows:

> *"There is no implication in what we have said that an association or organization in circumstances covered by § 6 must give explicit authority to its officers or agents to violate in a labor controversy the Sherman Act or any other law or to give antecedent approval to any act that its officers may do.* Certainly an association or organization cannot escape responsibility by standing orders disavowing authority on the part of its officers to make any agreements in violation of the Sherman Act and disclaiming union responsibility for such agreements. Facile arrangements do not create immunity from the act, whether they are made by employee or by employer groups. The conditions of liability under § 6 are the same in the case of each. *The grant of authority to an officer of a union to negotiate agreements with employers regarding hours, wages, and working conditions may well be sufficient to make the union liable. An illustrative but nonrestrictive example might be where there was knowing participation by the union in the operation of the illegal agreement after its execution.* And the custom or traditional practice of a particular union can also be a source of actual authorization of an officer to act for and bind the union."

Such requirements in the instant case could have only resulted in the cause to have been held a jury issue and judgment would not have been entered upon the record. Our record is replete with evidence which would more than satisfy the requirements of Section 6 of the Norris-LaGuardia Act as set forth above. We respectfully submit that the above opinion definitely allows presumption of law and fact, in stark contrast to the Pennsylvania Act which deliberately and actually removes them.

The minority opinion by Justice Frankfurter, joined in by Chief Justice Vinson and Justice Burton, concurring in result, found that the majority opinion immunized and sterilized labor unions from the rules of agency and that no evidence would be sufficient to meet the requirements laid down in the majority opinion. The minority opinion at page 787 states:

> "For practical purposes, this elucidation immunizes unions and corporate offenders for acts which their agents perform because they are agents and, as such, endowed with authority. For practical purposes, a union or a corporation could not be convicted on any evidence likely to exist, if the trial court has to charge what the Court now holds to be required by § 6."

If three members of the Supreme Court of the United States find that Section 6 of the Norris-LaGuardia Act immunizes labor unions and makes it impossible to successfully prosecute them—does not a Pennsylvania Act which is infinitely much broader, in that unions are not subject to presumptions of law and fact, violate the equal protection and due process laws of our Constitution. Does not such a case call for the

granting of writs of certiorari in order that this vital important Federal question may be determined and this damning piece of legislation be removed from the statutes of the State of Pennsylvania where it is still in force, having already caused the economic destruction of your petitioner and many other independent truckers and rendering every small business man in Pennsylvania helpless, when innocently caught in a struggle between labor and capital.

Conclusion.

Petitioner and his counsel represent that this petition for rehearing is not made for the purpose of delay, and that it is directed to the discretion and attention of the Court to the end that the Court might reconsider its order herein wherein it denied his petition, and grant this petitioner a rehearing so that the decision of the State Court may be properly reviewed and finally reversed.

EDWARD O. SPOTTS, JR.,
JOHN D. MEYER,
Counsel for Petitioner.